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Comments

WHEN THE INK DRIES, WHOSE TATT IS IT ANYWAY? THE COPYRIGHTABILITY OF TATTOOS

As a tattoo is grounded on living skin, so its essence emotes a poignancy unique to the mortal human condition.”¹

I. INTRODUCTION

Tattoos being used as a form of body modification predates 2000 B.C.² Over time, people have used tattoos to show dedication to their faith, as a form of status, and as a physical manifestation of art.³ Tattoos have grown in popularity through the years, becoming less taboo, and today, nearly 40% of “millennials” have at least one tattoo.⁴

Within the sports industry, tattoos are extremely prevalent.⁵ Many would assume that the bearer of the tattoo owns the tattoo.⁶ However, there is a difference between owning the tattoo that is placed on one’s body and owning the copyright to the tattoo design

1. MARGO DEMELLO, *BODIES OF INSCRIPTION: A CULTURAL HISTORY OF THE MODERN TATTOO COMMUNITY* 1 (2000) (quoting V. Vale & Andrea Juno).

2. See Cate Linberry, *Tattoos: The Ancient and Mysterious History*, SMITHSONIAN (Jan. 1, 2007), <http://www.smithsonianmag.com/history/tattoos-144038580/> [<https://perma.cc/EUB5-SDKU>] (“In terms of tattoos on actual bodies, the earliest known examples were for a long time Egyptian and were present on several female mummies dated to c. 2000 B.C. But following the more recent discovery of the Iceman from the area of the Italian-Austrian border in 1991 and his tattoo patterns, this date has been pushed back a further thousand years when he was carbon-dated at around 5,200 years old.”).

3. See *id.* (“These permanent designs—sometimes plain, sometimes elaborate, always personal—have served as amulets, status symbols, declarations of love, signs of religious beliefs, adornments and even forms of punishment.”).

4. See Shontavia Johnson, *Why Your Tattoo May Leave You Open to a Copyright Infringement Lawsuit*, RAW STORY (Aug. 8, 2016, 1:51PM), <http://www.rawstory.com/2016/08/copyright-and-trademark-laws-mean-your-tattoo-may-leave-you-open-to-an-infringement-lawsuit/> [<https://perma.cc/7T6C-WC8T>] (“More than 20 percent of all Americans have at least one tattoo, and for millennials that number jumps to almost 40 percent.”).

5. See *Athletes and Their Tattoos: From A-Z*, SPORTS ILLUSTRATED (Jan. 11, 2018), <http://www.si.com/more-sports/photos/2008/01/11-3athletes-and-their-tattoos-from-a-z> [<https://perma.cc/5JZL-DU7W>] (listing numerous athletes that play various sports and tattoos that athletes have).

6. For further discussion about the differentiation between authorship and ownership, see *infra* notes 71–77 and accompanying text.

itself.⁷ As of late, there has been an increase in tattoo artists filing lawsuits alleging copyright infringement against companies and athletes.⁸

Solid Oak Sketches, LLC filed one of the most recent lawsuits concerning the copyrightability and copyright ownership of tattoos when it sued Visual Concepts LLC, 2K Games, Inc. and Take-Two Interactive Software, Inc.⁹ Solid Oak Sketches alleged that the defendants committed copyright infringement when they digitally created tattoos featured on athletes' avatars in the game *NBA2K*.¹⁰ Solid Oak Sketches alleged it owned the copyrights to tattoos featured on numerous icons in the NBA, including tattoos on Kobe

7. See Yolanda M. King, *The Enforcement Challenges for Tattoo Copyrights*, 22 J. INTEL. PROP. L. 29, 35 (2014) [hereinafter King 2] ("Ownership and authorship become conflated in the context of tattoos because of the uniqueness of the medium on which the work is affixed."). For further discussion about the differentiation between authorship and ownership, see *infra* notes 71–77 and accompanying text.

8. See Samantha Elie, *Whose Tattoo? Body Art and Copyright (Part I)*, CTR. FOR ART L. (Mar. 16, 2016), <https://itsartlaw.com/2016/03/16/whose-tattoos-tattoos-and-copyright/> [<https://perma.cc/Y5X5-J63M>] (providing a detailed list of cases brought over past decade by tattoo artist claiming copyright infringement); Aaron Gordon, *Who Owns Tattoos?*, VICE SPORTS (Feb. 9, 2016), https://sports.vice.com/en_us/article/who-owns-tattoos [<https://perma.cc/S5UZ-8C45>] (detailing lawsuit filed by Solid Oak and causes of action therein).

9. See generally *Solid Oak Sketches, LLC v. 2K Games, Inc.*, No. 16-cv-00724-LTS, 2016 WL 4126543 (S.D.N.Y. 2016). See also Complaint, *Solid Oak Sketches*, No. 1:16-cv-00724, (S.D.N.Y. Feb. 1, 2016), <https://www.scribd.com/doc/297571191/Solid-Oak-Sketches-v-Take-Two> (providing pdf of Solid Oak's complaint against Take-Two); Darren Rovell, *Makers of NBA2K Sued for Using Players' Tattoos Without Permission*, ESPN (Feb. 1, 2016), http://www.espn.com/nba/story/_/id/14693836/makers-nba2k-sued-graphically-representing-tattoos-players-permission [<https://perma.cc/Q7XM-RKNW>] (summarizing why Solid Oak sued for copyright infringement for use of tattoos in *NBA2K*). The Southern District of New York noted that Section 412 of the Copyright Act is a "bright-line rule" that does not permit alleged plaintiffs to seek recovery for statutory damages and attorney's fees if the alleged infringement occurred before the plaintiff received copyright registration for the work that was infringed upon. *Solid Oak Sketeches*, 2016 WL 4126543, at *2. Solid Oak Sketches did not receive copyright registrations for the tattoos before 2K and Take Two digitally recreated the tattoos. *Id.* Therefore, its claim was dismissed. *Id.* at *4. This created a new argument that a defendant can use if the defendant copied the tattoo before the tattoo received copyright registration. See *id.*

10. See *id.* at *2; Eriq Gardner, *'NBA2K' Videogame Maker Sued for Copyright Infringement over LeBron James Tattoos*, HOLLYWOOD REP. (Feb. 1, 2016, 2:25 PM), <http://www.hollywoodreporter.com/thr-esq/nba-2k-videogame-maker-sued-861131> [<https://perma.cc/PF7N-SZJ6>] ("The action was filed on Monday in New York federal court by Solid Oak Sketches, which claims to own copyright to several tattoo designs featured on the bodies of NBA stars LeBron James, Kobe Bryant, Kenyon Martin, DeAndre Jordan and Eric Bledsoe. Solid Oak is suing Take-Two Interactive Software and other companies associated with the videogame *NBA 2K16* for unauthorized reproductions of those tattoo designs.").

Bryant and LeBron James.¹¹ Consequently, they sought \$1.1 million for an unauthorized reproduction of the copyrighted tattoos.¹²

When purported copyright owners of tattoos file lawsuits, the issues that must be addressed are whether tattoos are copyrightable and if so, who owns the copyright of the tattoos.¹³ Because all previous cases filed by tattoo artists who alleged copyright infringement settled before going to trial, there is a lack of case law on which potential plaintiffs can rely.¹⁴ Without clear precedent, both plaintiffs and defendants have little to rely on when evaluating their prospects of success at trial.¹⁵ This absence of case law leaves tattoo artists, their clients, and third parties in limbo.¹⁶

Rendering a decision about whether tattoos are copyrightable, and who would own such copyright, affects numerous industries

11. See Gardner, *supra* note 10 (noting how Solid Oak owns copyright to various athletes' tattoos).

12. See Gordon, *supra* note 8 ("On February 1, Solid Oak Sketches, a small agency that represents tattoo artists, sued the makers of the popular video game series *NBA2K* for \$1.1 million for digitally recreating the tattoos on the bodies of popular basketball players, including LeBron James and Kobe Bryant, without permission from the artists who inked them in the real world.").

13. See Matthew Belloni, *Warner Bros. Settles 'Hangover II' Tattoo Lawsuit (Exclusive)*, HOLLYWOOD REP. (June 20, 2011, 1:39 PM), <http://www.hollywoodreporter.com/thr-esq/warner-bros-settles-hangover-ii-203377> [<https://perma.cc/RMB7-3K2C>] ("As we noted when the case was filed, copyrighted works are copyrighted works, no matter whether they are painted on canvases or walls or the bodies of former heavyweight champions."); see also David M. Cummings, Comment, *Creative Expression and the Human Canvas: An Examination of Tattoos as a Copyrightable Art Form*, 2013 U. ILL. L. REV. 279, 282 (2013) ("This Note addresses the many issues that could arise if tattoos were the subject of copyright protection. It does so by evaluating tattoos under the Copyright Act in order to determine whether the Act, in relevant part, can—and should—be logically extended to include this genre."). But see Lauren Etter, *Tattoo Artists Are Asserting Their Copyright Claims*, ABA J. (Jan. 1, 2014), http://www.abajournal.com/magazine/article/tattoo_artists_are_asserting_their_copyright_claims [<https://perma.cc/6YG7-7AZ5>] ("Some have worried that all this litigation could result in people having to sign over the rights to their body anytime they are tattooed.").

14. See Timothy C. Bradley, *The Copyright Implication of Tattoos: Why Getting Inked Can Get You into Court*, 29 ENT. & SPORTS L. 1, 31 (2011) ("[D]isputes will continue to settle before trial, considering that the disputes . . . have much at stake, and the incentive to settle is high.").

15. See Jennifer L. Commander, Comment, *The Player, the Video Game, and the Tattoo Artist: Who Has the Most Skin in the Game?*, 72 WASH. & LEE L. REV. 1947, 1950 (2015) ("Television networks, magazine publishers, and video game creators all need answers regarding their legal exposure when it comes to feature athletes' tattoos, but not a single court has addressed the issue head-on."); see also Cummings, *supra* note 13, at 281 ("In fact, the extension of copyright protection to tattoos on human flesh is an issue of first impression—one that is yet to be ruled on by the Supreme Court of the United States—and thus the legal uncertainties are unprecedented and unresolved.").

16. See Commander, *supra* note 15, at 1950 (explaining how lack of precedent addressing copyrightability of tattoos affects large industries).

that are driven by celebrities' personas.¹⁷ When a tattoo becomes so recognizable that it is the primary source of a celebrity's identity, there is a gray area about where that tattoo can be used without infringing on a tattoo artist's copyrights.¹⁸ The difficulty of balancing a copyright owner's interest in protecting how their work is being used with a tattoo bearer's interest in their right of publicity and right to autonomy contributes to the gray area.¹⁹

There are two different categories of tattoos that are the focus of this article. The first is 'contemporaneously-placed tattoos,' which are tattoos that are simultaneously designed and applied on a person's body without a preliminary stencil, sketch, or drawing.²⁰ The tattooist creates a picture without guidance from a premade outline.²¹ The other is 'preliminarily-sketched tattoos,' which are previously created stencils or drawings that are later tattooed on a person's skin.²² The stencil or drawing is then placed on the patron's arm as a reference when the tattooist begins to place ink on the skin.²³ The difference between the two methods is that contemporaneously-placed tattoos require no preparation on behalf of the tattooist because the tattooist designs the tattoo as they go along, and preliminary sketch requires preparatory work on behalf of the tattooist.²⁴

This comment addresses whether contemporaneously-placed tattoos and preliminarily-sketched tattoos are copyrightable and

17. See *id.* (explaining how lack of precedent addressing copyrightability of tattoos affects large industries).

18. See Yolanda M. King, *The Right-of-Publicity Challenges for Tattoo Copyrights*, 16 NEV. L.J. 441, 453 (2016) [hereinafter King 3] ("A number of celebrities possess other indicia of identity, and a tattoo prominently fixed on the body of one of those celebrities should become an identifiable part of the celebrity's identity.").

19. See Cummings, *supra* note 13, at 279 ("[B]alancing the rights of the artist to retain control over her creation with the rights of the tattoo recipient to retain bodily autonomy").

20. See Michael C. Minahan, Comment, *Copyright Protection for Tattoos: Are Tattoos Copies?*, 90 NOTRE DAME L. REV. 1713, 1728 (2015) ("[A] tattoo artist may choose to create a tattoo contemporaneously with the tattooing client, without basing the tattoo on any work.").

21. See *id.* (defining contemporaneous tattoos)

22. See *id.* ("For a more custom or unique tattoo, a client might present the tattoo artist with his or her ideas for a tattoo then work with the tattoo artist to develop a preliminary drawing which will become the basis for the subsequent tattoo.").

23. See *id.* (defining what preliminarily-sketched tattoo and how it is created by tattooist).

24. See *id.* (discussing differences between contemporaneously-placed and preliminarily-sketched tattoos).

who owns the copyright if they are.²⁵ Part II provides an overview of the prerequisites for a work to receive copyright and whether tattoos can meet those requirements.²⁶ Next, Part II exhibits examples of tattoo artists exercising their copyrights, and follows up by listing defenses an alleged infringer can use against copyright infringement claims.²⁷ Part III argues that courts should not extend copyright protection to contemporaneously-placed tattoos or preliminarily-sketched tattoos, but to preliminary drawings that are placed on paper and later tattooed on an individual's skin.²⁸ Part IV analyzes what impact extending copyright protection only to preliminary drawings would have on the sports industry.²⁹

II. THE COPYRIGHT ACT: IS PROTECTION FOR TATTOOS SKIN-DEEP?

To determine whether copyright protection can be extended to contemporaneously-placed tattoos and preliminarily-sketched tattoos, the first step is to review and understand pertinent portions of the Copyright Act and copyright law.³⁰ Section A outlines the requirements to be considered copyrightable subject matter and analyzes whether tattoo meets the prerequisites.³¹ Section B examines the process used to decide who owns the copyright to a tattoo and concludes that if contemporaneously-placed and preliminarily-sketched tattoos are copyrightable, it is likely that tattoo artist are the sole authors and therefore the sole copyright owners of tat-

25. For further discussion about whether copyright protection should be extended to tattoos, see *infra* notes 185–252 and accompanying text.

26. For further discussion about the requirements for a work to be copyrightable and whether tattoos meet the requirements, see *infra* notes 35–59 and accompanying text.

27. For further discussion of tattoo artists exercising their rights and defenses that can be used against copyright infringement claims, see *infra* notes 60–184 and accompanying text.

28. For further discussion about why copyright protection should not be extended to contemporaneously-placed or preliminarily-sketched tattoos and should be extended to preliminary drawings under specific circumstances, see *infra* 185–252 and accompanying text.

29. For further discussion about what impact extending copyright protection only to preliminary drawings would have on the sports industry, see *infra* notes 253–262 and accompanying text.

30. See generally 17 U.S.C. §§ 101, 102, 106, 107, 201, 407 (2012) (pertinent portions of Copyright Act). See also Cummings, *supra* note 13, 282 (“In order to determine whether the Copyright Act logically applies to tattoos, it is important to first understand the relevant portions of copyright law.”). The Copyright Act is lengthy and codified at 17 U.S.C. §§ 101–810.

31. For a discussion about the requirements to be considered copyrightable subject matter and whether tattoo meets the prerequisites, see *infra* notes 35–59 and accompanying text.

toos.³² Section C provides an overview of tattoo artists' exclusive rights, examples of tattoo artists enforcing their rights, and the broader ramifications of each case settling before going to trial.³³ Section D provides an overview of defenses that can be used by defendants (tattoo bearers and third parties) to assert why their alleged conduct does not equate to copyright infringement, with some of the defenses assuming that contemporaneously-placed and preliminarily-sketched tattoos are copyrightable and others attacking why contemporaneously-placed and preliminarily-sketched tattoos are not copyrightable.³⁴

A. Prerequisites to Being Copyrightable Subject Matter

The Copyright Act protects "original works of authorship fixed in any tangible medium of expression . . . from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine of device."³⁵ If a person wanted their work to be afforded copyright protection or be deemed copyrightable, the work needs to be (1) a *fixed* tangible medium and (2) an original work of authorship.³⁶ There has been great debate about whether tattoos meet the requirements to be copyrightable subject matter.³⁷ In order to understand this debate, it is important to provide a detailed outline of both requirements first.³⁸

The Copyright Act first requires that for a work to be copyrightable subject matter, it must be "fixed in any tangible medium of expression."³⁹ For a work to be "fixed," it must be embedded for

32. For a discussion about the process used to decide who owns the copyright to tattoos, see *infra* notes 60–94 and accompanying text.

33. For a discussion about tattoo artists' exclusive rights, examples of tattoo artists enforcing their rights, and the significance of the settlements of those cases, see *infra* notes 95–133 and accompanying text.

34. For a discussion about defenses tattoo bearers and alleged third-party infringers may use to refute why their alleged conduct is not copyright infringement, see *infra* notes 134–184 and accompanying text.

35. 17 U.S.C § 102(a).

36. See Yolanda M. King, *The Challenges "Facing" Copyright Protection for Tattoos*, 92 OR. L. REV. 129, 132 (2013) [hereinafter King 1] (citing § 102(a)) (noting requirements for work to be considered copyrightable subject matter are for work to be one of original authorship in fixed tangible medium).

37. See, e.g., Commander, *supra* note 15, at 1954 ("The only realistic challenge to whether tattoos deserve the label of copyrightable subject matter involves their fixed nature, and whether skin qualifies as a tangible medium of expression.").

38. For a detailed discussion about the requirements to be considered copyrightable subject matter, see *infra* notes 39–59 and accompanying text.

39. § 102(a).

“more than a transitory duration.”⁴⁰ The purpose of the fixation requirement is to pinpoint when the work existed to determine whether it can be afforded copyright protection.⁴¹ Therefore, even if the duration of a work is temporary, it satisfies the fixation requirement.⁴² An argument supporting why contemporaneously-placed and preliminarily-sketched tattoos meet the fixed requirement is that the work in which the medium is fixed is unessential to the analysis of fixation because the Copyright Act’s language intended to cover an extensive range of mediums.⁴³ However, some disagree and argue skin is unable to be fixed because it is constantly changing with time; therefore, contemporaneously-placed and preliminarily-sketched tattoos are not copyrightable.⁴⁴ Scholars that prefer not to include the medium of expression into the fixation analysis rebut the counterargument by highlighting that tattoos do have a permanent quality to them, which easily satisfies the “more than transitory duration” prong in the fixation analysis.⁴⁵

The second requirement that must be met for a work to be eligible for copyright protection is that it be “original.”⁴⁶ *Feist Publications v. Rural Telephone Service Co.*⁴⁷ set forth a two-prong test to use when determining whether a work is original.⁴⁸ First, the work must be “independently created by the author.”⁴⁹ Second, the work

40. Minahan, *supra* note 20, at 1716 n.22 (quoting § 101). Further, “the fixation requirement may be satisfied even if the fixation is temporary.” *Id.* at 1717 (citing *MAI Sys. Corp. v. Peak Computer, Inc.* 991 F.2d 511, 518–19 (9th Cir. 1993)).

41. *See id.* at 1716 (“The primary function of the fixation requirement is to establish the point in time at which a work exists that may be eligible for copyright protection.”).

42. *See id.* at 1717 (citing *Cartoon Network LP v. CSC Holdings*, 536 F.3d 121, 129 (2d Cir. 2008)). In *Cartoon Network*, the Second Circuit stated that “an embodiment is fixed unless a reproduction manifests itself so fleeting that it cannot be copied.” 536 F.3d at 127 (citation omitted) (internal quotations omitted).

43. *See* Minahan, *supra* note 20, at 1717 (“The medium in which the work is fixed is irrelevant to the analysis of fixation, as the Copyright Act was intended to encompass a broad scope of mediums of expression from paint on canvass to those mediums that require assistance of technology to enable human perception.”).

44. *See, e.g.,* Commander, *supra* note 15, at 1954 (“As skin ages, stretches, shrinks, burns, and varies pigments, a tattoo on that changing skin morphs as well, calling into question whether a tattoo can ever be fixed.”).

45. *See id.* at 1954 (“Tattoos, however, ultimately possess a rather permanent quality . . . skin can most certainly serve as a tangible medium of expression.”).

46. § 102(a).

47. 499 U.S. 340 (1991).

48. *See* Minahan, *supra* note 20, at 1717–18 (citing *Feist Publ’ns*, 499 U.S. at 345).

49. *Feist Publ’ns*, 499 U.S. at 345 (“Original, as the term is used in copyright, means only that the work was independently created by the author (as opposed to copied from other works).”).

must possess a “modicum of creativity.”⁵⁰ To be independently created, the author must not have copied from another person’s work.⁵¹ For example, two authors who create the same work of expression without copying the other will meet the “independent creation” prong of the test.⁵² The “modicum of creativity” standard is a fairly low creativity standard to meet.⁵³ Tattoos are able to fulfill the originality requirement without difficulty because most tattoo artists create and develop tattoos independently, and modicum of creativity is such a low threshold to meet that the simplest tattoo can surpass the threshold with ease.⁵⁴ Within the originality requirement, a work must also be a “work[] of authorship.”⁵⁵ To be a work of authorship, the work must be created by an author and fall under one of the listed categories under Section 102 of the Copyright Act.⁵⁶ The Act never defines what ‘author’ is, but it is generally understood to be the creator of the work.⁵⁷ Section 102 lists eight items that are considered works of authorship.⁵⁸ There

50. *Id.* This requires that the work “possesses at least some minimal degree of creativity.” *Id.*

51. *See id.* (explaining how author must not have copied another person’s work for their work to be considered original).

52. *See id.* at 345–36 (“Originality does not signify novelty; a work may be original even though it closely resembles other works so long as the similarity is fortuitous, not the result of copying. To illustrate, assume that two poets, each ignorant of the other, compose identical poems. Neither work is novel, yet both are original and, hence, copyrightable.”).

53. *See id.* at 345 (“To be sure, the requisite level of creativity is extremely low; even a slight amount will suffice. The vast majority of works make the grade quite easily, as they possess some creative spark, ‘no matter how crude, humble or obvious’ it might be.”); Minahan, *supra* note 20, at 1718 (“The *Feist* standard presents a relatively low hurdle for copyrightability.”).

54. *See* Minahan, *supra* note 20, at 1727 (“Undoubtedly, in many circumstances, a tattoo will consist of a tattoo artist’s independently created expression that possesses the necessary creativity. On the opposite end of the spectrum, for example when a tattoo consists of words or common geometric shapes such as a heart or clover, it is likely that the work would not have been independently created by the tattoo artist and would not meet the minimum requirements for creative expression.”).

55. § 102(a); *see* Cummings, *supra* note 13, at 286 (quoting § 102(a)) (“In addition to being original, a work must be a ‘work of authorship’ to be copyrightable.”).

56. *See* Cummings, *supra* note 13, at 286 (citing § 102) (explaining two prongs work needs to fulfill to be considered work of authorship).

57. *See id.* (“The term ‘author’ is left completely undefined in the Act. This may be because ‘author’ is a relatively straightforward concept, and the actions of the author are more crucial to understanding the law.”).

58. § 102(a) (1)–(8); *see* Cummings, *supra* note 13, at 286 (“It is clear based on the legislative intent that these eight categories were not intended to be exhaustive and that Congress aimed to create a flexible standard.”). The list of categories includes, but is not limited to: “(1) literary works; (2) musical works, including any accompanying words; (3) dramatic works, including any accompanying music; (4)

have been arguments made that tattoos fall under “pictorial, graphic, and sculptural works” and “architectural works.”⁵⁹

B. Determining Copyright Ownership: Tattoo Artist or Client?

After determining whether a work is copyrightable subject matter, the next step is to identify who owns the work because the individual that owns the work is entitled to enforce copyright protection.⁶⁰ Section 201 of the Copyright Act states that “[c]opyright in a work protected under this title vests in the author or authors of the work.”⁶¹ The Act outlines three forms of authorship: sole authorship, joint authorship, and works-for-hire.⁶² Each type of authorship has different implications regarding ownership of work.⁶³ Prior to dissecting the various authorships, it is important to distinguish authorship versus ownership.⁶⁴

The definitions of authorship and ownership can be regularly intertwined depending on the medium the work is fixed on.⁶⁵ As-

pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.” § 102(a)(1)–(8).

59. See Cummings, *supra* note 13, at 296–97 (quoting § 102(a)(5), (8)) (“It also appears that a tattoo could easily meet this requirement set by § 102(a). This Section of the Act states that ‘works of authorship include the following categories . . . (5) pictorial, graphic, and sculptural works.’”). But see Matthew W. Parker, *That Old Familiar Sting: Tattoos, Publicity, and Copyright*, 15 J. MARSHALL REV. INTELL. PROP. L. 762 (2016) (arguing that tattoos can receive protection under Architectural Works Copyright Act).

60. See Minahan, *supra* note 20, at 1718 (“Once a work has been determined to be copyrightable, it is necessary to identify the proper owner of the copyright who will possess the rights conferred by the copyright statute.”).

61. § 201(a); see also Minahan, *supra* note 20, at 1718 (“Section 201(a) provides that initial ownership of the copyright in a protected work vests in the author or authors of the work.”).

62. See § 201 (discussing different forms of copyright ownership). See also King 2, *supra* note 7, at 35 (quoting JULIE E. COHEN ET AL., COPYRIGHT IN A GLOBAL INFORMATION ECONOMY 116 (3d ed. 2010)) (stating that there are “three kinds of authorship: sole authorship, joint or co-authorship, and employer authorship of ‘works made for hire’”); Minahan, *supra* note 20, at 1718–20 (discussing sole and joint authorship and works made-for-hire).

63. See King 1, *supra* note 36, at 155 (“Therefore, the classification of a work of authorship is integral to the determination of the exclusive rights of the owner of the copyright in that work of authorship.”); Minahan, *supra* note 20, at 1718 (“Once a work has been determined to be copyrightable, it is necessary to identify the proper owner of the copyright who will possess the rights conferred by the copyright statute.”).

64. For further discussion about the difference between authorship and ownership, see *infra* notes 71–77 and accompanying text.

65. See King 2, *supra* note 7, at 35 (“Ownership and authorship become conflated in the context of tattoos because of the uniqueness of the medium on which the work is affixed.”).

suming that contemporaneously-placed and preliminarily-sketched tattoos are copyrightable, it is vital to note that a person can own a tattoo, but not own the copyright in the tattoo.⁶⁶ For example, for a preliminarily-sketched tattoo, the process involves a premade design that later becomes a tattoo that is placed on a person's body.⁶⁷ In this example, there is an author of the tattoo, who owns the copyright in the design, and there is the owner of the embodiment of the work who physically possesses the tattoo.⁶⁸ This bifurcation causes much confusion to the answer to "who is the owner of the copyright in the tattoo?"⁶⁹ Delineating the various forms of authorship will aid in answering said question.⁷⁰

1. *Sole Authorship and Joint Authorship*

Sole authorship is when one person independently created a work.⁷¹ Copyright protection is only extended to "works that are 'representatives of [the] original intellectual conceptions of the author.'" ⁷² When a work is developed from the "original intellectual conceptions" of one person, that individual is the sole author—no matter how many individuals were involved to create the work.⁷³

66. *See id.* ("The author of the tattoo owns the copyright in it; however, the owner of the copyright may not be the person whose body is adorned to the tattoo. Ownership of the copyright is distinct from ownership of the tattoo itself.")

67. For further discussion about preliminarily-sketched tattoos see *supra* notes 20–24 and accompanying text.

68. *See id.* (explaining how owner of copyright in work and owner of physical embodiment of work can be two different people).

69. *Id.*; *see id.* at 35–36 ("For tattoos, the owner of the physical object is the person to whose skin the tattoo is affixed. However, is this person also the author of the tattoo art, and therefore, the owner of the copyright in the tattoo? Or could the copyright owner be another party—the tattoo artists, the tattoo parlor owner, or other parties who may have a copyright interest in the drawing or other material used to create the tattoo? Or in some cases, are the tattoo artist and his customer joint authors of the tattoo?").

70. For a discussion about sole authorship, joint authorship, and works made-for-hire, see *infra* notes 71–94 and accompanying text.

71. *See* Minahan, *supra* note 20, at 1718–19 (explaining concept of "sole authorship" of work).

72. *Id.* at 1719 (alteration in original) (quoting *Burrow-Giles Lithographic Co. v. Sarony*, 111 U.S. 53, 58 (1884)). Minahan elaborates on sole authorship as follows:

Copyright protection subsists in works that are 'representatives of [the] original intellectual conceptions of the author.' Even if the efforts of numerous people are utilized to produce a work, a work may only have one author who was the single person to whom the 'original intellectual conceptions' of the work may be attributed.

Id. (alteration in original) (citations omitted).

73. *Id.* (quoting *Sarony*, 11 U.S. at 58).

Joint authorship is when “two or more authors with the intention that their contributions merged into inseparable or interdependent parts of a unitary whole.”⁷⁴ The key component in figuring out whether a work is one of joint ownership is the intent behind the authors.⁷⁵ If two parties do not have the intention that their contributions are to become an indivisible whole, there is no joint authorship in the work, and no joint ownership in the copyright.⁷⁶ There are lower chances that a tattoo would be of joint authorship because most clients rely on a tattoo artist to independently create a unique tattoo for the client.⁷⁷

2. *Works Made-For-Hire*

When an individual is hired to make a work or given a specific task to create a work during their employment at a company, it is a work-for-hire situation.⁷⁸ Employee-created works and independent contractor-created works are two subdivisions within the work-for-hire category.⁷⁹ A work is employee-created when it is “prepared by the employee within the scope of his or her employment.”⁸⁰ The Supreme Court’s decision in *Community for Creative*

74. *Id.* (quoting 17 U.S.C. § 101).

75. See Commander, *supra* note 15, at 1974 (explaining why there is heavy emphasis on intent in proving joint authorship); Minahan, *supra* note 20, at 1719 (discussing importance of intent to be co-authors).

76. See Commander, *supra* note 15, at 1974 (noting importance of intent when assessing whether joint authorship applies to work); Minahan, *supra* note 20, at 1719 (stating that when courts attempt to establish intent at joint authorship, they have considered, among other factors, “the delegation of decision-making authority, how the parties billed or credited themselves with respect to the work, and the content of written contracts”).

77. See Commander, *supra* note 15, at 1974 (detailing why joint authorship would most likely not apply to tattoo).

78. See Minahan, *supra* note 20, at 1720 (citing § 101) (discussing works made-for-hire). The Copyright Act defines a work made for hire as:

(1) a work prepared by an employee within the scope of his or her employment; or (2) a work specially ordered or commissioned for use as a contribution to a collective work, as a part of a motion picture or other audiovisual work, as a translation, as a supplementary work, as a compilation, as an instructional text, as a test, as answer material for a test, or as an atlas, if the parties expressly agree in a written instrument signed by them that the work shall be considered a work made-for-hire.

§ 101. For further discussion about works made-for-hire categories, see *infra* notes 79–94 and accompanying text.

79. See King 2, *supra* note 7, at 41 (defining two works made-for-hire categories); see also *infra* notes 80–91 and accompanying text.

80. King 2, *supra* note 7, at 41 (quoting § 101); see also Commander, *supra* note 15, at 1969 (“A work for hire ‘is a work prepared by an employee within the scope of his or her employment, or a work specially ordered or commissioned to fit within a list of nine categories that treat the tattooer as an independent contractor.’”) (quoting Alexa L. Nicko, *Getting Down to (Tattoo) Business: Copyright Norms*

*Non-Violence v. Reid*⁸¹ concluded that agency common law meaning should be applied to the phrase “a work prepared by an employee under the scope of his or her employment.”⁸² The Court examined the hired party’s “right to control the manner and means by which the product is accomplished” to determine whether the hired party is categorized an employee under the common law of agency.⁸³ The Court provided several factors to examine when assessing a hired party’s status as an employee.⁸⁴ Applying the common law understanding of “employee” to tattoo artist, it is unlikely that a “work-for-hire” status would be given to a tattoo artist because it is hard to apply such relationship to a service provider and a client.⁸⁵

The second subset of works made-for-hire is independent contractor-created works.⁸⁶ Independent contractor-created works are produced when an entity or person “specially ordered or commissioned a work.”⁸⁷ There are two steps that must be satisfied to meet categorized as such.⁸⁸ First, the work that is commissioned must be

and Speech Protections for Tattooing, 20 MICH. TELECOMM. TECH. L. REV.183, 204 (2013)).

81. 490 U.S. 730 (1989).

82. King 2, *supra* note 7, at 44 (quoting *Cnty. for Creative Non-Violence*, 490 U.S. at 738); see Minahan, *supra* note 20, at 1720 (citing *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52) (discussing how Supreme Court interpreted term “employee” in Copyright Act).

83. Minahan, *supra* note 20, at 1720 n.49 (quoting *Cnty. for Creative Non-Violence*, 490 U.S. at 751); see also *Cnty. for Creative Non-Violence*, 490 U.S. at 751 (“In determining whether a hired party is an employee under the general common law of agency, we consider the hiring party’s right to control the manner and means by which the product is accomplished.”).

84. See Minahan, *supra* note 20, at 1720 n.49 (citing *Cnty. for Creative Non-Violence*, 490 U.S. at 751–52). The Supreme Court listed the factors as follows: [T]he skill required; the source of the instrumentalities and tools; the location of the work; the duration of the relationship between the parties; whether the hiring party has the right to assign additional projects to the hired party; the extent of the hired party’s discretion over when and how long to work; the method of payment; the hired party’s role in hiring and paying assistants; whether the work is part of the regular business of the hiring party; whether the hiring party is in business; the provision of employee benefits; and the tax treatment of the hired party.

Cnty. for Creative Non-Violence, 490 U.S. at 751–52.

85. See Minahan, *supra* note 20, at 1720 (noting how tattoo artist would be defined as employee under *Cnty. for Creative Non-Violence* because most of factors would weigh against being categorized as employee under agency common law).

86. See King 2, *supra* note 7, at 41 (defining independent contractor-created works).

87. *Id.* (quoting § 101).

88. See Minahan, *supra* note 20, at 1720 (citing § 101) (“First, the purpose of the work must be for use as a contribution to a collective work that falls within one of the categories enumerated in §101. To satisfy the second requirement, the parties must expressly agree that the work will be considered a ‘work made for hire.’”); see also King 2, *supra* note 7, at 46 (“Therefore, in order to qualify as an

one of the options listed in Section 101 of the Copyright Act and be a contribution to a larger collective body of work.⁸⁹ Second, the hired contractor and the person or group that commissioned the work must explicitly agree that the work will be identified as a “work made-for-hire.”⁹⁰ Applying these steps to the process of creating a tattoo, it would be burdensome to prove that a tattoo is a part of a larger collective body of work because, generally, a tattoo would not be considered a part of a “collective work”—which is defined as “a work, such as a periodical issue, anthology, or encyclopedia, in which a number of contributions, constituting separate and independent works in themselves, are assembled into a collective whole.”⁹¹

In sum, if contemporaneously-placed and preliminarily-sketched tattoos are copyrightable, most tattoo artists will claim that they are the sole authors of their tattoos and own the copyright to those works.⁹² A tattoo artist’s client would face an uphill battle supporting their argument that the tattoo artist and client should be considered joint authors because joint authorship requires intent by both parties to unify their contributions.⁹³ It is even more difficult for a client to establish that there was some form of a work-for-hire relationship because the client lacks the authority under agency law for a tattooist to be categorized as an employee, and tattoos would probably not be deemed part of a collective work, and

independent contractor work, the work must fall into one of nine enumerated categories. In addition, ‘the parties [must] expressly agree in a written instrument signed by them that the work shall be considered a work made for hire.’”) (quoting § 101).

89. See Minahan, *supra* note 20, at 1720 (stating first requirement).

90. See *id.* (quoting § 101) (noting how parties must expressly agree that work is a “work made-for-hire” for status to apply).

91. See King 2, *supra* note 7, at 46–47 (stating it would be difficult to prove that tattoo is “contribution to a collective body of work, and that “absent this classification, tattoos would not fall within one of the independent contractor categories of works”); § 101. See also Minahan, *supra* note 20, at 1729–30 (“[T]he tattoo must be for use as a contribution to a collective work and the tattoo artist and client must agree that the tattoo is a ‘work made for hire.’ This prong will likely not be satisfied since a tattoo is generally not intended to be incorporated into a collective work.”).

92. See Minahan, *supra* note 20, at 1730 (“A tattoo is unlikely to be a ‘joint work’ since the client probably could not be found to have made an independently copyrightable contribution to the creation of the tattoo. It is possible that the tattoo artist and the client could both intend to be coauthors of the tattoos; however, it is more likely that the tattoo artist would view himself or herself as the sole author of the work.”).

93. See *id.* (explaining why tattoo artists are more likely to be viewed as sole authors instead of as joint authors with their clients).

would fail to satisfy one of the prongs for the independent contractor test.⁹⁴

C. Tatted-up Celebrities and the Tattoo Artists That Call the Shots

Once it is established whether the work is copyrightable and who is the author of the work, the next logical question is which individual or group owns the copyright to the work.⁹⁵ Assuming that contemporaneously-placed and preliminarily-sketched tattoos are copyrightable and tattooist are the authors of the tattoos, it must be decided whether the tattooist or the celebrity patron owns the copyright to the tattoo.⁹⁶ Usually the author of a work is the owner of the copyright of the work, but not always.⁹⁷ In Section B, an example of an individual being an author of a work and not the owner of the copyright, would be a work-for-hire situation.⁹⁸ The person that owns the copyright to a work holds specific rights.⁹⁹ The Copyright Act states that the owner of the copyright has the exclusive “right to reproduce the copyrighted work, to prepare derivative works based on the copyrighted work, the right to distribute copies of the copyrighted work, and the right to publicly display the

94. See *id.* at 1729 (“First, since a tattoo artist is not likely to be found to be the employee of his or her client under the common law agency standard promulgated by *Community for Creative Non-Violence v. Reid*, the first possibility of qualifying under the doctrine does not apply. Second, for a tattoo artist to qualify as an independent contract under the second option of the ‘work made for hire’ doctrine, the tattoo must be for use as a contribution to a collective work and the tattoo artist and client must agree that the tattoo is a work made for hire.’ This prong will likely not be satisfied since a tattoo is generally not intended to be incorporated into a collective work.”).

95. See King 2, *supra* note 7, at 36 (“In order to resolve questions regarding ownership of a tattoo copyright, one must first determine the author of the copyrightable work.”); see also § 201 (“Copyright in a work protected under this title vests initially in the author or authors of the work.”).

96. For further discussion about the difference between ownership and authorship, see *supra* notes 64–70 and accompanying text.

97. For further discussion about why an author can be the owner of a copyright, and the difference between authorship and ownership, see *supra* notes 64–70 and accompanying text.

98. For further discussion about work-for-hire and ownership of copyright, see *supra* notes 78–92 and accompanying text.

99. See Commander, *supra* note 15, at 1955 (“The owner of a copyright possesses certain exclusive rights.”); see also § 106 (“The owner of copyright under this title has the exclusive rights to do and to authorize any of the following: 1) to reproduce the copyrighted copies . . . 2) to prepare derivative works . . . 3) to distribute copies . . . of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; 4) . . . to perform the copyrighted work publicly; 5) . . . to display the copyrighted work publicly; and 6) . . . to perform the copyrighted work publicly by means of a digital audio transmission.”).

copyrighted work.”¹⁰⁰ The copyright owner has the right to make copies of their own work.¹⁰¹ Therefore, it is arguable that “recreating the original tattoo in a digital format explicitly creates a derivative version of the original work, violating the artist’s exclusive right to all derivative works. Finally, and most controversially, whenever, the recipient of the tattoo appears in public, he violates the artist’s right to publicly display the copyrighted work.”¹⁰² More and more tattoo artists are beginning to enforce their copyrights against companies and individuals that use tattoos they created without receiving permission.¹⁰³ All of the cases settled and did not have the chance to address whether copyright should be extended to tattoos.¹⁰⁴

1. *Mike Tyson*

In *Whitmill v. Warner Brothers Entertainment, Inc.*,¹⁰⁵ tattoo artist, Victor Whitmill, filed a suit against Warner Brothers for copyright infringement alleging that Warner Brothers copied, distributed, displayed, and made an unauthorized derivative work for featuring the tattoo he created for Tyson on advertisements without his permission.¹⁰⁶ Whitmill freehand-tattooed Mike Tyson’s iconic face tattoo.¹⁰⁷ Before the case settled, Judge Catherine D. Perry of the

100. Commander, *supra* note 15, at 1955 (citing § 106); *see also* King 2, *supra* note 7, at 33 (“Section 106 of the Copyright Act of 1976 provides several exclusive rights to the copyright owner of a work. The copyright owner has the exclusive right to, inter alia, reproduce, distribute, display, and create derivatives of the copyrighted work.”).

101. *See* § 106 (stating copyright owner has rights “to reproduce the copyrighted copies . . . to prepare derivative works.”).

102. Commander, *supra* note 15, at 1955–56 (citing § 102).

103. *See* Etter, *supra* note 13 (recounting recent copyright infringement claims filed by tattoo artists).

104. *See* Elie, *supra* note 8 (“In the past ten years, a handful of tattoo artists have begun asserting their rights, only to discover that the legal field has never officially defined to which rights tattoo artists are entitled. Starting in 2005 when artist Matthew Reed sued Nike over a commercial featuring a tattoo he created on NBA star Rasheed Wallace’s arm, a handful of artists have filed complaints for copyright infringement. Yet all of these claims have settled out of court.”) (citation omitted).

105. No. 4:11-CV-00752 (E.D. Mo. 2011).

106. *See* Complaint at 1, *Whitmill*, No. 4:11-CV-00752 (E.D. Mo. Apr. 28, 2011) (summarizing Whitmill’s copyright infringement claim against Warner Brothers Entertainment). *See generally* Cummings, *supra* note 13, at 294 (“On April 28, 2011, S. Victor Whitmill filed a complaint in the U.S. District Court for the Eastern District of Missouri against Warner Brothers. This complaint, alleging copyright infringement under the Copyright Act.”); Minahan, *supra* note 20, at 1724–25 (discussing *Whitmill*).

107. *See* Complaint at 5, *Whitmill*, No. 4:11-CV-00752 (detailing when Whitmill tattooed Mike Tyson); *see also* Cummings, *supra* note 13, at 294 (“In February 2003,

Eastern District of Missouri made comments during the preliminary hearings that weigh in favor of giving tattoos copyright protection.¹⁰⁸ She mentioned that Whitmill was not restricting how Mike Tyson used his face or how or when he should be able to change the tattoo, only that the tattoo can be copyrighted.¹⁰⁹

2. *Rasheed Wallace*

Tattoo artist, Matthew Reed, filed a suit against Nike, Inc., Rasheed Wallace, and advertising agency, Weiden + Kennedy, for copyright infringement in *Reed v. Nike, Inc.*¹¹⁰ Wallace asked Reed to create an Egyptian-style tattoo that would cover his upper arm.¹¹¹ Reed later saw an advertisement that included Wallace, which he did not mind, but he took issue with how the tattoo was used.¹¹² The advertisement heavily incorporated the tattoo and detailed the

Whitmill created and applied an ‘original and distinctive’ tattoo around the outer portion of the left eye of former world champion heavyweight boxer Mike Tyson.”); Minahan, *supra* note 20, at 1730 (“In 2003, Whitmill tattooed an ‘original and distinctive’ design on the left side of Mike Tyson’s face.”).

108. See Commander, *supra* note 15, at 1962 (citing Transcript of Hearing on Motion for Preliminary Injunction at 3, *Whitmill*, No. 4:11-CV-00752 (E.D. Mo. June 21, 2011)) (stating how Judge Perry believes Whitmill has credible claim on merits).

109. See Transcript of Hearing on Motion for Preliminary Injunction at 3, *Whitmill* No. 4:11-CV-00752 (“Of course tattoos can be copyrighted. I do not think there is any reasonable dispute about that. They are not copyrighting Mr. Tyson’s face, or restricting Mr. Tyson’s use of his own face . . . or saying that someone who has a tattoo can’t remove the tattoo or change it, but the tattoo itself and the design itself can be copyrighted, and I think it’s entirely consistent with the copyright law.”).

110. No. 3:05-CV-00198 (D. Or. 2005); see Complaint at 12–15, *Reed*, 2005 WL 1182840 (D. Or. Feb. 10, 2005) (summarizing how Reed tattooed Wallace and is suing Wallace, Nike, and Weiden + Kennedy). See also King 1, *supra* note 36, at 142–45 (discussing *Reed*); Commander, *supra* note 15, at 1956–60 (discussing *Reed*); Minahan, *supra* note 20, at 1722–24 (discussing *Reed*).

111. See Complaint at 10, *Reed*, 2005 WL 1182840 (noting how Reed made sketch prior to tattooing Wallace); see also Commander, *supra* note 15, at 1956 (“After finalizing the design, Reed created the stencil that would help transfer the agreed upon drawing onto Wallace’s skin.”); Meredith Hatic, Comment, *Who Owns Your Body Art?: The Copyright and Constitutional Implications of Tattoos*, 23 FORDHAM INTELL. PROP. MEDIA & ENT. L.J. 396, 418 (2012) (“In a second meeting, Wallace proposed changes to the sketch Reed had drawn and, over the course of three sessions, Reed applied the tattoo to Wallace.”).

112. See Complaint at 12–15, *Reed*, 2005 WL 1182840 (“During the spring of 2004, Mr. Reed became aware that the tattoo he had applied to Mr. Wallace’s arm was being featured as part of an advertising campaign including a commercial for Nike highlighting Mr. Wallace. That commercial, which was broadcast on television and over the Internet, features the tattoo filling the screen in a close up, then the tattoo and the process of its creation are simulated by a computerized method with a voice over by Mr. Wallace describing the tattoo and its meaning.”).

tattoos meaning.¹¹³ After Reed viewed the commercial, he filed for copyright registration and filed a suit for copyright infringement.¹¹⁴ Reed alleged that Nike and Weiden + Kennedy infringed on his copying, reproduction, distribution, adaptation, and public display rights and that Wallace committed contributory infringement.¹¹⁵ The case settled between the parties before going to trial.¹¹⁶

3. *Carolos Condit*

Escobedo v. THQ, Inc.,¹¹⁷ dealt with tattoo artist Christopher Escobedo, who sued video game developer THQ for making a digital replication of the lion tattoo he created for Carolos Condit without his permission.¹¹⁸ THQ sold *UFC Undisputed 3*, a fighting video game that featured Condit's character.¹¹⁹ The character included a reproduction of Condit's tattoo and the details of the tattoo were clearly seen because the tattoo was significantly displayed.¹²⁰ Escobedo made a stencil of the tattoo prior to tattooing it on Condit,

113. See Commander, *supra* note 15, at 1958 (citing *Rasheed Wallace – Nike Commercial*, YOUTUBE (Aug. 25, 2015), <https://www.youtube.com/watch?v=bXPhGf8Bi74> [<https://perma.cc/97TJ-XR4G>] (“In the advertisement Wallace describes both tattoos, and their meaning, as a simulated version of the creation process fills them in on his arms.”); Minahan, *supra* note 20, at 1723 (“The commercial included a full-screen depiction of the Wallace tattoo, a computerized recreation of the tattoo, and a voiceover by Wallace ‘describing the tattoo and its meaning.’”).

114. See King 1, *supra* note 36, at 143 (“After Reed saw the advertisement, he filed an application to register copyrights for the drawings related to the tattoo.”); Minahan, *supra* note 20, at 1723 (describing when Reed filed copyright registration and lawsuit).

115. See Commander, *supra* note 15, at 1958 (“Reed accused Nike of infringing on his copyright by reproducing, distributing, adapting, and publicly displaying his original design without his consent, permission, or authority.”); see also Minahan, *supra* note 20, at 1723 (citing Complaint at 4, *Reed*, 2005 WL 1182840) (summarizing Reed's allegations).

116. See Minahan, *supra* note 20, at 1724 (noting how parties settled prior going to trial).

117. No. 2:12-CV-02470 (D. Ariz. 2012).

118. See Minahan, *supra* note 20, at 1725 (citing Complaint at 1–2, *Escobedo*, 2012 WL 5815742 (D. Ariz. Nov. 16, 2012)) (stating who plaintiff and defendant are); see also Eriq Gardner, *Tattoo Artist Looks to Show Value of Copyright Claim Against Videogame Publisher*, HOLLYWOOD REP. (Sept. 10, 2013, 2:22 PM), <http://www.hollywoodreporter.com/thr-esq/tattoo-artist-looks-show-value-625509> [<https://perma.cc/8VQA-R56B>] (summarizing Escobedo's copyright infringement claim against THQ).

119. See Minahan, *supra* note 20, at 1726 (citing Complaint at 3, *Escobedo*, 2012 WL 5815742) (stating video game “included a computer-generated character representing Condit that could be selected for use during the gameplay—the Condit character featured a reproduction of the Condit tattoo”).

120. See *id.* (citing Complaint at 3–4, *Escobedo*, 2012 WL 5815742) (describing how the tattoo was featured on *Undisputed 3*).

and later registered the sketch with the Copyright Office.¹²¹ He never included Condit in the suit because he granted Condit an implied license to display the tattoo.¹²² The case was later dismissed for failure to prosecute.¹²³

4. *Ricky Williams*

Scott Allen tattooed football player, Ricky Williams, on his upper arm.¹²⁴ Allen later saw the tattoo displayed on various EA Sports video games, including *NFL Street*, *Madden NFL 10*, and *Madden NFL 11*, and Allen sued EA Sports for violating his right to copy, reproduce, distribute, publically display, and make derivate works.¹²⁵ In addition, Allen “sued Williams for contributory infringement of his copyright and exclusive rights” and “in the alternative, he sued Williams for an accounting of his share in the profit from any use of the tattoo as a co-owner of the work.”¹²⁶ Allen later entered into a settlement with EA Sports and Williams.¹²⁷

5. *The Nexus of the Cases: Tying the Cases Together*

The fact that all the previously mentioned cases settled provides credence to the belief that the defendants were concerned

121. See *id.* at 1725–26 (citing Complaint at 3–4, *Escobedo*, 2012 WL 5815742) (“Prior to tattooing Condit, Escobedo first sketched the Condit tattoo on paper, which became the basis for the subsequent tattoo.”); see also Copyright Registration Number VA-1094-747, entitled “Lion Tattoo” (Feb. 24, 2014) (Escobedo’s Copyright Registration Number).

122. See Minahan, *supra* note 20, at 1726 (citing Complaint at 3–4, *Escobedo*, 2012 WL 5815742) (noting that Escobedo stated he gave Condit implied license).

123. See *id.* (citing Minute Entry, *Escobedo*, No. 2:12-CV-02470 (D. Ariz. Dec. 11, 2013)) (noting that case was later dismissed).

124. See Commander, *supra* note 15, at 1963 (citing Complaint at 2, *Allen v. Elec. Arts, Inc.*, No. 5:12-CV-03172 (W.D. La. Dec. 31, 2012)) (“Ricky Williams visited Crybabies Tattoo, Allen’s place of business, and requested Allen to apply a tattoo to his upper arm.”); see also Scott Flaherty, *EA, Ex-NFL Star Face Copyright Suit over Game Cover Tattoos*, LAW 360 (Jan. 7, 2013, 1:01 PM), <https://www.law360.com/articles/404977/ea-ex-nfl-star-face-copyright-suit-over-game-cover-tattoos> [<https://perma.cc/C6E5-2J94>] (providing overview of copyright dispute between Allen, Electronic Arts, and Williams).

125. See Commander, *supra* note 15, at 1963–64 (citing Complaint at 5, *Allen*, No. 5:12-CV-03172) (“Allen sued EA Sports for violating his exclusive rights and specifically for copying, reproducing, distributing, making unauthorized derivative work, and publicly displaying the copyrighted work.”). Allen’s causes of action were filed under Sections 106 and 501 of the Copyright Act. See *id.* at 1964 n.85 (citing Complaint at 6, 9, *Allen*, No. 5:12-CV-03172).

126. *Id.* at 1964 (citing Complaint at 6, 9, *Allen*, No. 5:12-CV-03172) (summarizing Allen’s claim against Williams).

127. See *id.* (citing Order at 1, *Allen*, No. 5:12-CV-03172 (W.D. La. Apr. 9, 2013)) (“Allen ultimately entered into a settlement agreement with EA Sports and Williams, just three and a half months after filing his complaint.”).

that the tattoo artists had legitimate copyright claims.¹²⁸ On the other hand, the defendants may have decided that settling the cases was just the most efficient way to handle their respective business.¹²⁹ However, it is important to highlight that some of the tattoos were drawn or stenciled prior to the design being tattooed on the celebrity and others were not.¹³⁰ The distinction between contemporaneously-placed and preliminarily-sketched tattoos will have an influential impact on the analysis on whether a tattoo should receive copyright protection.¹³¹ Another distinction is that some tattoo artist alleged that the bearers of the tattoos were contributory infringers, which deals with whether there is an implied license when a tattoo artist tattoos a celebrity customer.¹³² Finally, a majority of the tattoo artists took issue with a third party profiting off of their work, bringing into question whether implied licenses extend to third parties.¹³³

D. Defenses Against Copyright Infringement of Tattoos

There are a series of defenses that may be used against tattoo artists claiming copyright infringement on the premise that tattoos are subject to copyright protection: (1) fair use, (2) tattoos cannot be copies, (3) implied licenses, and (4) public policy concerns.¹³⁴

128. See *id.* at 1965 (“The fact that all three major cases settled indicates at least some fear on the part of the defendants that tattoo artists have legitimate copyright infringement claims.”).

129. See *id.* (“Alternatively all of the defendants wanted to avoid the nuisance of ongoing litigation and the bad publicity associated with the trial, recognized litigation as a cost of doing business, and could afford to throw settlement money at their copyright problems without any negative effect on their business.”).

130. See Minahan, *supra* note 20, at 1728 (“For a more custom or unique tattoo, a client might present the tattoo artist with his or her ideas for a tattoo then work with the tattoo artist to develop a preliminary drawing which will become the basis for the subsequent tattoo. In contrast, for those more trusting clients, a tattoo artist may choose to create a work contemporaneously with the tattooing of the client, without basing the tattoo on any prior work.”).

131. For further discussion about how preliminarily-sketched and contemporaneously-placed tattoos receive different analyses regarding whether copyright extension should be extended, see *infra* notes 200–216 and accompanying text.

132. See Minahan, *supra* note 20, at 1726 (“In his complaint, Escobedo alleged that he had granted Condit an implied license to display the Condit tattoo on his body.”); but see Commander, *supra* note 15, at 1958 (“Reed also sued Wallace on two separate counts: first for contributory infringement.”).

133. See Commander, *supra* note 15, at 1956–64 (discussing how tattoo artists sued third parties for copyright infringement for featuring the tattoos without tattooist’s consent); Minahan, *supra* note 20, at 1722–26 (discussing same).

134. See, e.g., King 2, *supra* note 7, at 63–67 (discussing implied licenses); Commander, *supra* note 15, at 1965–69 (discussing fair use); Hatic, *supra* note 111, at 420 (discussing public policy concerns); Minahan, *supra* note 20, at 1732–36 (discussing whether tattoos are copies). For further discussion about defenses al-

The fair use and implied licenses defenses argue that the alleged infringing conduct falls under an exception and does not constitute copyright infringement.¹³⁵ The tattoos cannot be copies and public policy defenses argue that tattoos should not be afforded the copyright protection.¹³⁶ The tattoos are not copies defense is based on the rationality that Congress did not intend for tattoos to be a tangible medium that should be afforded protection.¹³⁷ Public policy concerns focus on how an individual's constitutional right to not be enslaved would be stripped if copyright protection is extended to tattoos, and, to prevent such injustices, copyright protection should not be expanded to include tattoos.¹³⁸

1. *Fair Use*

The Copyright Act states that the fair use of a copyrighted work applies when the purpose of the use is "criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship or research."¹³⁹ If a work is used for fair use, then the use is not considered a violation of the Copyright Act.¹⁴⁰ The Copyright Act provides additional factors to consider when analyzing

leged infringers can use to argue why they did not commit copyright infringement, see *infra* notes 134–184 and accompanying text.

135. See *More Information on Fair Use*, U.S. COPYRIGHT OFFICE, (citing 17 U.S.C. § 107) <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/XXX7-BRMX>] (last visited Mar. 10, 2017) ("Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use."); see also *Implied Copyright Licenses: A Last Resort for Unwritten Agreements*, ACUMEN L. GROUP (Sept. 23, 2017), <https://www.copyright.gov/fair-use/more-info.html> [<https://perma.cc/7NUM-QUNW>] ("Ultimately, an implied license provides the licensee (the business owner in our scenario) some nonexclusive rights to use the copyrighted work to the extent that the copyright author would have allowed had the parties initially negotiated and signed an agreement.").

136. See Minahan, *supra* note 20, at 1735 ("Since, under the foregoing interpretation of the Copyright Act, the human body is not an 'object,' it would not qualify as a 'copy' in which a work can be fixed. When a tattoo is created contemporaneously with its application to human skin, the fixation requirement cannot be satisfied because, per the requirements of the Copyright Act, there is no resultant copy of the work.").

137. See *id.* (arguing that Congress did not intend for human body to be considered as an "object" under definition of "copies," and, therefore, tattoos cannot meet requirements under statutory language to receive copyright protection).

138. For further discussion about how tattoo clients will have their constitutional rights stripped from them if copyright protection is extended to tattoos, see *supra* notes 173–184 and accompanying text.

139. Commander, *supra* note 15, at 1966 (quoting § 107).

140. See § 107 (detailing how fair use is not copyright infringement).

whether use of a work is fair use: “(1) the purpose and character of the use;” “(2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in comparison of the copyrighted work; and (4) the effect upon the use on the potential market or value of the copyrighted work.”¹⁴¹ The ultimate goal of the fair use doctrine is to allow “authors to draw upon preexisting works for purposes of criticizing, disseminating news, teaching or commentary in order to further Congress’s and the Copyright Act’s goals of promoting science and the useful arts and stimulating creativity.”¹⁴² If tattoos are copyrightable, fair use is always an effective defense as long as the use falls within one of the categories outlined in the Copyright Act.¹⁴³ This is also a limitation of the fair use defense, it applies to a narrow category.¹⁴⁴ For third parties, fair use of a copyrighted tattoo would most likely entail using it in the form of a parody or in news reporting.¹⁴⁵ An example would be filmmakers directly copying a tattoo to develop a conversation by way of criticizing and commenting on the tattoo.¹⁴⁶

2. *Tattoos Are Not Copies*

There is a persuasive argument that tattoos cannot receive copyright protection because human skin cannot fulfill the statutory requirement to be defined as a copy under the Copyright Act.”¹⁴⁷ The Copyright Act defines ‘copies’ as “material objects . . . in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device.”¹⁴⁸ To be considered fixed, a work must last for “more than a transitory duration,” and the medium on which the work is placed

141. Commander, *supra* note 15, at 1966 (citing § 107).

142. Hatic, *supra* note 111, at 409–10 (citing §107).

143. § 107 (stating categories that fall under fair use).

144. See U.S. COPYRIGHT OFFICE, *supra* note 135 (“Courts evaluate fair use claims on a case-by-case basis, and the outcome of any given case depends on a fact-specific inquiry. This means that there is no formula to ensure that a predetermined percentage or amount of a work—or specific number of words, lines, pages, copies—may be used without permission.”).

145. See Hatic, *supra* note 111, at 410 (“Fair use of a copyrighted tattoo is most likely to occur in the form of parody or in the course of news reporting.”).

146. See *id.* (“For instance, in television shows such as Saturday Night Live, or in comedic films . . . filmmakers might directly copy a well-known tattoo in order to conjure up the original work and to comment on or criticize either the preexisting work or the subject on which it appears.”).

147. See Minahan, *supra* note 20, at 1732 (“By defining ‘copies’ as ‘material objects,’ Congress likely did not intend to include human skin within the category of mediums in which copyrightable work could be embodied.”).

148. *Id.* (quoting § 101).

must be considered a copy under the Act.¹⁴⁹ The human skin is not a medium on which a work may be fixed because it is constantly changing even though to the human eye a tattoo has a permanent quality, and also because Congress probably did not consider human skin a material object in which a work can be fixed when drafting the statute.¹⁵⁰ The strength of this argument is that it is based solely on statutory interpretation of the plain language.¹⁵¹ If a court were only to examine the plain language of the statute, it would likely conclude that human skin is not a material object because it does not fall within the definition of ‘material objects.’¹⁵² However, if interpretation of the statute’s plain language is not the only method to use to ascertain what words mean, then there is a possibility that a judge may conclude that tattoos can be a copy if it examines the statutory history and Congress’s intent.¹⁵³

3. *Implied Licenses*

The Copyright Act specifies that transfers in ownership be made in writing.¹⁵⁴ However, a non-exclusive implied license need not be in writing.¹⁵⁵ A non-exclusive license “‘permits the use of a copyrighted work in a particular manner’ and serves as an affirma-

149. See Minahan, *supra* note 20, at 1732 (citing § 101) (“To satisfy the ‘fixation’ requirement for copyrightable subject matter, a work must be ‘embodied in a copy,’ therefore, if there is no ‘copy’ of a work the fixation requirement cannot be satisfied and the work is not copyrightable subject matter under the Copyright Act.”).

150. See Commander, *supra* note 15, at 1954 (discussing changing of skin over time); see also Minahan, *supra* note 20, at 1732 (“By defining ‘copies’ as ‘material objects,’ Congress likely did not intend to include human skin within the category of mediums in which copyrightable work could be embodied.”).

151. See Minahan, *supra* note 20, at 1733 (“Examination of the copyright statute as a whole also indicates that inclusion of the human body as a ‘copy’ would require absurd interpretation of other provisions.”).

152. For further discussion about why human skin is not an intended medium for a work to be fixed, see *supra* note 150 and accompanying text.

153. See Katharine Clark & Matthew Connolly, *A Guide to Reading, Interpreting, and Applying Statutes*, GEO. U. L. CTR. (Apr. 2006), <https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/A-Guide-to-Reading-Interpreting-and-Appling-Statutes.pdf> [<https://perma.cc/3EKE-9GAK>] (outlining various tools available when interpreting statutory language).

154. See Craig P. Bloom, Comment, *Hangover Effect: May I See Your Tattoo Please?*, 31 CARDOZO ARTS & ENT. L.J. 435, 459 (2013) (citing § 204) (“The Copyright Act requires that transfers of ownership be made in writing. A non-exclusive license, however, is excluded from the writing requirement.”); see also King 2, *supra* note 7, at 63 (“While the Copyright Act requires that a transfer of copyright ownership be in writing, there is no writing requirement for an implied nonexclusive license.”).

155. See Bloom, *supra* note 154, at 459 (stating that non-exclusive license does not need be in writing).

tive defense to copyright infringement.”¹⁵⁶ It can be implied, and the agreement be made *via* conduct.¹⁵⁷ When using a non-exclusive license defense, there are three questions to ask: “(1) whether a copyright owner granted an implied license; (2) whether the use of the copyrighted work was within the scope of the implied license; and (3) whether the copyright owner revoked the implied license prior to the infringing conduct.”¹⁵⁸ There is much discourse as to whether an implied license extends to third parties or remains just with the person on whom the tattoo is adorned.¹⁵⁹ Escobedo, who tattooed Condit’s tattoo, granted an implied license to Condit but sued THQ, Inc. because that license did not extend to the company as a third party.¹⁶⁰ A benefit of the non-exclusive license defense for celebrities is that celebrities can argue that tattooists give an implied license to display the tattoo, and no infringement occurs because of the license.¹⁶¹ However, a setback for third parties is that an implied license probably does not extend to third parties because a tattooist gives the implied license solely to the celebrity.¹⁶²

156. See *id.* (quoting *I.A.E., Inc. v. Shaver*, 74 F.3d 768, 775 (7th Cir. 1996)) (discussing what non-exclusive license entails).

157. See King 2, *supra* note 7, at 63 (discussing implied licenses). “An implied license ‘may be granted orally, or may even be implied from conduct.’” *Id.* (quoting *Effects Assoc., Inc. v. Cohen*, 908 F.2d 555, 558 (9th Cir. 1990)).

158. Bloom, *supra* note 154, at 459.

159. See *Harris v. Emus Records Corp.*, 734 F.2d 1329, 1334 (9th Cir. 1984) (citations omitted) (“Such an interpretation of a license accords with the policies underlying enactment of the Copyright Act. The legislative history reveals an acute awareness of the need to delicately balance competing interests. On the one hand, there was a strong reluctance to allow a monopolization of works or compositions; at the same time, there was an awareness of the necessity of preserving the rights of authors and composers in order to stimulate creativity.”); *SQL Sols., Inc. v. Oracle Corp.*, 1991 WL 626458, at *6 (N.D. Cal. 1991) (citing *Emus Records*, 734 F.2d at 1334) (“The prohibition against transfer of patent licenses is longstanding and frequently invoked. *Emus Records* court observed that a parallel prohibition against the transfer of copyright licenses gave effect to the policy of protecting creativity underlying enactment of the Copyright Act.”).

160. See King 2, *supra* note 7, at 66–67 (citing Bloom, *supra* note 154, at 468) (“However, while the scope of this license may encompass commercial use of the work, particularly for clients who are athletes and celebrities, the license does not cover commercial uses by third parties, or in instances like [Condit], a client’s cooperation with third parties’ commercial use of a tattoo.”).

161. See King 3, *supra* note 18, at 445–46 (citing LOUIS ALTMAN & MALLA POLLACK, *CALLMAN ON UNFAIR COMPETITION, TRADEMARKS & MONOPOLIES* § 22.32 (4th ed. 2015)) (“Generally, state right-of-publicity laws allow a plaintiff to recover upon a showing that an item of commerce associated with his or her identity has economic value. Right-of-publicity laws have been extended to cover references to a persona such as voice, name, photograph, likeness, signature phrase, and fictional character.”).

162. See *Understanding the Difference Between a Transfer and a License*, DIGITAL MEDIA L. PROJECT, <http://www.dmlp.org/legal-guide/understanding-difference-between-transfer-and-license> [https://perma.cc/BSG9-LSXW] (last visited Mar. 9,

4. *Public Policy Concerns for Celebrity Tattoos*

There are two predominate public policy arguments against permitting tattoo artists of celebrities having copyrights to their work: (1) a celebrity's right of publicity and (2) a celebrity's right to autonomy over their body.¹⁶³ These two arguments address concerns such as: "What happens when a tattoo becomes 'inextricably intertwined' with the celebrity's persona?" and "Can a tattoo artist deny a celebrity from certain projects if it highlights their work?"¹⁶⁴

In *Haelan Laboratories v. Topps Chewing Gum Inc.*,¹⁶⁵ Judge Jerome Frank "coined the term 'right to publicity' in an effort to distinguish it from the right of privacy."¹⁶⁶ In *Haelan Laboratories*, Judge Frank concluded that prominent individuals should be permitted to benefit financially when businesses use their personas, and, if those individuals were not able to authorize the use of their image in exchange for financial gain, it would cause damage.¹⁶⁷ A

2017) ("When you give someone a non-exclusive license, you give the licensee permission to exercise the right in question, but you also reserve the right to continue exercising it yourself and to authorize others to do so The recipient of a non-exclusive license may exercise the right or rights licensed, but MAY NOT: authorize others to exercise the right or rights licensed via transfer or license without permission of the copyright owner; and sue for copyright infringement of the licensed right(s)."); see also Bloom, *supra* note 154, at 468 ("[I]t is evident that commercial use is permitted by a tattoo holder's implied license in certain situations, and never permitted by third parties.").

163. See Hatic, *supra* note 111, at 420 ("In tattoo cases, because of the nature of the medium in which the copyrighted work is fixed, interests including the right to publicity and the constitutional right to control one's body must weigh more heavily in determining whether infringement occurred.").

164. For further discussion about right of publicity and tattoos becoming intertwined with a celebrity's persona, see *infra* notes 165–184 and accompanying text. See also King 2, *supra* 7, at 159.

165. 202 F.2d 866 (2d Cir. 1953).

166. King 3, *supra* note 18, at 450 (quoting *Haelan Labs.*, 202 F.2d at 868).

167. See *id.* at 450–51 (citing *Haelan Labs.*, 202 F.2d at 868). In *Haelan Labs*, Judge Frank famously noted:

We think that, in addition to and independent of that right of privacy (which in New York derives from statute), a man has a right in the publicity value of his photograph, i.e., the right to grant the exclusive privilege of publishing his picture, and that such a grant may validly be made 'in gross,' i.e., without an accompanying transfer of a business or of anything else. Whether it be labelled a 'property' right is immaterial; for here, as often elsewhere, the tag 'property' simply symbolizes the fact that courts enforce a claim which has pecuniary worth. This right might be called a 'right of publicity.' For it is common knowledge that many prominent persons (especially actors and ball-players), far from having their feelings bruised through public exposure of their likenesses, would feel sorely deprived if they no longer received money for authorizing advertisements, popularizing their countenances, displayed in newspapers, magazines, busses, trains and subways.

Id. at 450–51 (quoting *Haelan Labs.*, 202 F.2d at 868).

celebrity's right of publicity is infringed upon when an unauthorized use will damage the celebrity's commercial value.¹⁶⁸ A celebrity's identity or persona is how they make money, and personas can include iconic marks, attire, and even tattoos.¹⁶⁹ When the tattoos become an identifier of the celebrity's persona, the tattoo essentially becomes the celebrity's identity and is eligible for protection under the right of publicity.¹⁷⁰ A celebrity's right of publicity clashes with a tattooist's claims of copyright because, theoretically, a tattooist would be able to control how a celebrity uses the tattoo (a celebrity's identity) due to the vested copyrights in the tattoo.¹⁷¹ It works against the purpose of the right of publicity because the whole purpose is to enable celebrities to profit off of the use of their personas, and permitting tattoo artists to have influence over how and when a tattoo is used inhibits on a celebrity's ability to exercise their right.¹⁷²

Another policy argument is that every individual has the fundamental right to not be enslaved.¹⁷³ Enabling tattoo artists to decide how a tattoo can be used on a person's body curtails a person's

168. See *id.* at 451 (“[T]he right of publicity protects against damage to the commercial value of an individual’s identity.”); see also J. THOMAS MCCARTHY, 5 MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 28:1 (4th ed. 2016) (“This legal right is infringed by unpermitted use which will likely damage the commercial value of this inherent right of human identity and which is not immunized by principles of free speech and free press. Infringement of the right of publicity is a commercial tort, and a form of unfair competition.”).

169. See, e.g., Anjelica Oswald, *Here Are 27 of the Most Iconic Celebrity Tattoos*, INSIDER (Sept. 11, 2015, 5:55pm), <http://www.thisisinsider.com/celebrity-iconic-tattoos-inspiration-2017-9#adam-levine-has-a-huge-mermaid-holding-a-skull-tattooed-on-his-back-11> [<https://perma.cc/U4Q9-GKSV>] (listing celebrities and tattoos they are known for).

170. See King 3, *supra* note 18, at 446 (“If a celebrity’s tattoo becomes indicia of that celebrity’s identity, then the tattoo is now a part of the protectable right of publicity of that celebrity. Thus, a tattoo is a rare instance of a publicity right born from copyrightable work.”).

171. See Parker, *supra* note 59, at 767 (“Under the current system a person has a copyrighted image on their body which may wholly belong to another person. Because of that copyrighted image, the law allows that other person to have some say in how the person uses their likeness Through the act of receiving an original tattoo on their body, a celebrity has given away a piece of their right of publicity to another party who not gets to dictate its use. This runs counter to the goals of the rights of publicity as well as a basic sense of equity.”).

172. See Minahan, *supra* note 20, at 1731 (“Since Tyson is a celebrity/athlete who likely derives significant income from his appearances in person, on television, and in films, forcing him to forego these public appearances could have a significant impact on his ability to earn an income.”).

173. See, e.g., King 2, *supra* note 7, at 67–69 (discussing Thirteenth Amendment implications if tattoo artists hold copyrights of tattoos); Bloom, *supra* note 154, at 439–443 (discussing Thirteenth Amendment implications if tattoo artists hold copyrights of tattoos); see also U.S. CONST. AMEND. XIII, § 1 (“Neither slavery nor involuntary servitude, except as punishment for crime whereof the party shall

autonomy over their body.¹⁷⁴ Extending copyright to a work that is carried on the human body causes issues regarding slavery by allowing the tattooist to have control over the celebrity.¹⁷⁵ If copyright is not limited to traditional mediums, it will be difficult to draw the line about what authority an owner of a copyright has over a person's body regarding the use of a tattoo.¹⁷⁶ The Copyright Act gives copyright owners the right to display their works.¹⁷⁷ If copyright is extended to tattoos, tattoo artists will be able to prevent a celebrity from making public appearances or even request that a celebrity cover their tattoo.¹⁷⁸ These are extreme examples of how a copyright owner can wield the authority of the copyright to impose when and where a celebrity can use the tattoo, thwarting a celebrity's autonomy.¹⁷⁹

There are a few consequences that may occur if copyright protection is extended to tattoos.¹⁸⁰ First, a tattoo artist might have the right to compel a bearer of a tattoo to not remove the tattoo if the

have been duly convicted, shall exist within the United States, or any place subject to its jurisdiction.”)

174. See Bloom, *supra* note 154, at 442–43 (stating that such situation would “result [in] control by tattoo, which some believe amounts to *involuntary servitude* or a form of ownership in the body of another”); Cummings, *supra* note 13, at 309 (“[I]n a society which values individual freedoms and human rights above all else, this potential harm to human rights could prove fatal when deciding whether or not to extend copyright protection to tattoos.”).

175. See Commander, *supra* note 15, at 1979 (“Without a harsh deviation . . . ‘copyright law thereby becomes the instrument to impose, almost literally, a badge of involuntary servitude, akin to the mark which ranchers brand the cattle they own’ onto the recipient of a tattoo.”). But see Bloom, *supra* note 154, at 442 (“It is unsettling to think that a copyright holder could dictate how another person may display the tattoo on his body. Nevertheless, this scenario does not amount to involuntary servitude under the Thirteenth Amendment. Consequently, tattoos remain copyrightable.”).

176. For further discussion about possible consequences if copyright protection is extended to tattoos, see *infra* notes 180–184 and accompanying text.

177. See Cummings, *supra* note 13, at 309 (citing 17 U.S.C. § 106(5)) (stating Copyright Act “specifically confers upon a copyright holder affirmative display rights”). Section 106(5) of the Copyright Act states that “[t]he owner of copyright under this title has the exclusive right[] to . . . display [or authorize the display of] the copyrighted work publicly.” *Id.* (alteration in original) (quoting § 106(5)).

178. See *id.* at 310 (citing § 106(5)) (“The language of the Act seems to suggest that the tattoo artist may legally prohibit that person from making the public appearance, or at least compel her to cover up the portion of her body displaying the tattoo.”).

179. See *id.* (describing power of tattoo copyright holder). For further discussion about the negative effect of extending copyright protection to tattoos, see *supra* notes 175–179 and accompanying text and *infra* notes 180–184 and accompanying text.

180. See Cummings, *supra* note 13, at 308–09 (discussing consequences). For further discussion about the consequences of allowing tattooist to receive exclusive rights under the Copyright Act, see *infra* notes 181–183 and accompanying text.

tattoo gains notoriety.¹⁸¹ Second, a judge can order the tattoo bearer to remove the tattoo if the bearer adds another tattoo to the copyrighted work to make a large piece of work, which can be considered an unauthorized derivative work.¹⁸² Third, a bearer of copyrighted tattoos will not have any legal protection against the previously mentioned consequences.¹⁸³ Ultimately, a person's interest to not be subject to a form of enslavement substantially outweighs reasons why copyright should be extended to tattoos.¹⁸⁴

III. INK ON PAPER, NOT SKIN: WHY TATTOOS ARE NOT COPYRIGHTABLE

Extending copyright protection to tattoos is not as straightforward as it may appear.¹⁸⁵ The requirements to be copyrightable subject matter have been previously discussed, and Section A of this section reasons that, at a glance, tattoos do meet the requirements

181. See Cummings, *supra* note 13, at 308 (citing Declaration of David Nimmer at ¶¶ 47–48., *Whitmill v. Warner Bros. Entm't Inc.*, No. 4:11-CV-00752 (E.D. Mo. May 20, 2011)) (“These scenarios and the human rights implications that stem from them are a large part of what Professor Nimmer feared when he concluded that copyright protection is inappropriate for the world of tattoos. The core issue here is that copyright protection effectively becomes a means for the control of a person through an author’s ability to control what a person may permanently etch or remove from her skin.”); see also Hatic, *supra* note 111, at 408–09 (“However, where a tattoo does qualify as such a work . . . could present additional conflicts with the subject’s right to bodily autonomy. Arguably, where a tattooed subject decided to alter his tattoo, or perhaps even remove it, the artist (if he were the owner) would have the right to prevent such a modification. As with the enforcement of an artist/owner’s right to public display, enforcing the right to attribution and integrity could potentially conflict with the subject’s constitutional right to control his own body.”).

182. See Cummings, *supra* note 13, at 308 (citing § 106(a)(3)(A)–(B)) (“The language of § 106A seems to suggest that a court could order the individual not to remove the tattoo, or even order the individual to receive laser removal of alterations or modifications made to it.”). But see Parker, *supra* note 59, at 775 (arguing that tattoo artists “have no right to demand or require that a person have an infringing tattoo removed from their bodies by any means, owing to the cost and pain of such a procedure, although they may offer economic incentives to entice them to do so”).

183. See Cummings, *supra* note 13, at 309–10 (noting that bearers of tattoos will not be able to protect themselves from unlimited power copyright owners have over tattoo adorned on their skin).

184. See *id.* at 307–08 (“While tattoo artist, and society in general, will benefit from this very incentive for creation that they would receive as a part of copyright extension, the inquiry is not this simple [T]he human form is far from a traditional medium of expression, and extending the protections and rights that the Copyright Act guarantees to authors creates a host of unique issues when a human being is involved. The potential between the rights of the author and the basic human rights of the recipient is problematic to say the least.”).

185. See, e.g., *id.* at 308–11 (discussing issues associated with extending copyright protection to tattoos).

and should receive copyright protection.¹⁸⁶ However, an in-depth examination of the Copyright Act and related cases supports the proposal that copyright protection should only be extended to preliminary drawings and not contemporaneously-placed and preliminarily-sketched tattoos.¹⁸⁷ Section B expounds on the significance between preliminary drawings and contemporaneously-placed and preliminarily-sketched tattoos, and why tattoos placed on the human body cannot be categorized as a “copy.”¹⁸⁸ Section C summarizes public policy concerns that add supplementary support about why tattoos cannot acquire copyright protection.¹⁸⁹ Section D outlines various defenses celebrity tattoo bearers and third parties can present if tattoo artists of preliminary sketches claim that they committed copyright infringement.¹⁹⁰

A. Tattoos Are Eligible for Copyright Protection . . . Maybe

The Copyright Act requires a work to be an “original work[] of authorship fixed in any tangible medium of expression” to receive copyright protection under the statute.¹⁹¹ First, a tattoo can meet the originality requirement.¹⁹² Tattoos are usually independently created by the tattooist, satisfying one prong of the originality requirement.¹⁹³ Tattoos possess the necessary creative spark to pass the low modicum of creativity threshold because it is an expression of idea through a niche technique, tattooing, and the expression is unique, satisfying the second prong of the originality requirement.¹⁹⁴

186. See *supra* notes 35–59 and accompanying text (discussing requirements for copyrightable subject matter); *infra* notes 191–199 and accompanying text (discussing whether, on its face, tattoos meet the basic requirements to be copyrightable subject matter); see also Cummings, *supra* note 13, at 311 (concluding “tattoos are fully capable of satisfying the Act’s requirements of originality, fixation, and authorship”).

187. For further discussion about whether tattoos should be afforded copyright protection, see *infra* notes 191–252 and accompanying text.

188. For further discussion about the difference between pre-sketched tattoos and contemporaneous tattoos, see *infra* notes 200–216 and accompanying text.

189. For further discussion about the policy concerns regarding extending copyright protection to tattoos, see *infra* notes 217–221 and accompanying text.

190. For further discussion about the defenses that can be used against copyright infringement claims for preliminary sketches, see *infra* notes 222–252 and accompanying text.

191. 17 U.S.C. § 102(a).

192. See Minahan, *supra* note 20, at 1727 (noting originality requirement).

193. See *id.* (noting how tattoo is usually an “independently created expression”).

194. See *id.* (“Undoubtedly, in many circumstances, a tattoo will consist of a tattoo artist’s independently created expression that possesses the necessary creativity.”). But see *id.* (“On the opposite end of the spectrum, for example when a

Next, is the fixation requirement.¹⁹⁵ To be fixed, a work must last “for a period of more than transitory duration” and there are arguments for and against why tattoos are fixed.¹⁹⁶ The argument for why tattoos are fixed is, to the human eye, the work is permanent because it cannot be removed from the body unless extreme measures are taken.¹⁹⁷ The argument against tattoos being fixed is that the human skin is not permanent because it is constantly changing as time moves forward, and even though to the human eye the work is permanent, through a microscopic lens, the skin is constantly changing.¹⁹⁸ Judge Perry’s comments during the preliminary injunction in *Whitmill* weighs in that tattoos are copyrightable even though human skin is the medium on which tattoos are fixed.¹⁹⁹

B. The Difference Between Ink to Paper and Ink to Skin

However, despite Judge Perry’s conclusion, arguably the distinction between sketching a design on a traditional medium prior to tattooing the design on a person and contemporaneously designing and tattooing is vital to whether copyright will be afforded to a work.²⁰⁰ The tattoo artists in *Reed* and *Escobedo* created sketches prior to tattooing the design on their respective clients and later registered their drawings.²⁰¹ It is important to note that the artists

tattoo consists of words or common geometric shapes such as a heart or clover, it is likely that the work would not have been independently created by the tattoo artist and would not meet the minimum requirements for creative expression.”).

195. See *id.* (noting fixation requirement).

196. § 101. For further discussion about the fixation requirements, see *supra* notes 39–45 and accompanying text.

197. See Minahan, *supra* note 20, at 1717 (“The medium in which the work is fixed is irrelevant to the analysis of fixation, as the Copyright Act was intended to encompass a broad scope of mediums of expression from paint on canvass to those mediums that require assistance of technology to enable human perception.”).

198. See Commander, *supra* note 15, at 1954 (“As skin changes, stretches, shrinks, burns, and varies pigments, a tattoo on that changing skin morphs as well, calling into question whether a tattoo can ever be fixed.”).

199. See *supra* notes 108–109 and accompanying text (discussing Judge Perry’s statement during *Whitmill* litigation); see also Commander, *supra* note 15, at 1962 (citing Transcript of Hearing on Motion for Preliminary Injunction at 3, *Whitmill v. Warner Bros. Entm’t, Inc.*, No. 4:11-CV-00752 (E.D. Mo. June 21, 2011)) (stating how Judge Perry believes *Whitmill* has credible claim on merits). But see Minahan, *supra* note 20, at 1727 (“Although the . . . application of the Copyright Act seems to indicate that, in general, tattoos could be copyrightable subject matter, the resolution of the issue should not be as obvious as Judge Perry would make it seem.”).

200. See Minahan, *supra* note 20, at 1732–36 (discussing this distinction).

201. See *id.* at 1728 (discussing tattoo artists sketches in *Reed* and *Escobedo*). For further discussion of *Reed v. Nike, Inc.*, No. 3:05-CV-00198 (D. Or. 2005), see *supra* notes 110–116 and accompanying text. For further discussion of *Escobedo v.*

claimed that there was copyright infringement on their tattoos; however, the proper claims would have been copyright infringement on the preliminary drawings.²⁰² The tattoo reproduction based on the drawing was an unauthorized derivative work and copy of the preliminary drawing.²⁰³

The tattoo artist in *Whitmill* contemporaneously designed and tattooed the design on Tyson, which calls into question whether the human body meets the requirement of being a “fixed tangible medium” because the tattooist was claiming copyright ownership of the tattoo, which is on human skin.²⁰⁴ It is important to first examine whether Congress intended the human body to be included in the definition of ‘copies.’²⁰⁵ The dictionary definition of object is “a thing that you can see and touch and that is not alive.”²⁰⁶ Since the human body does not fall into the purview of the dictionary definition of ‘object’ because it is a living thing, there is a high probability that “Congress . . . did not intend to include human skin within the category of mediums in which a copyrightable work could be embodied.”²⁰⁷

THQ, Inc., No. 2:12-CV-02470 (D. Ariz. 2012), see *supra* notes 117–123 and accompanying text.

202. See Minahan, *supra* note 20, at 1728 (“While the artists’ lawsuits alleged infringement of their tattoos, the alleged infringement is more properly characterized as an infringement on their drawings, not the completed tattoo. Therefore, when Reed and Escobedo allege the ownership of a copyright and infringement of their rights, it is not a copyright in the tattoo, but a copyright in the preliminary drawings.”).

203. See *id.* (noting that reproduction of preliminary sketch without authorization is copyright infringement of preliminary sketch).

204. See *id.* at 1728–29 (discussing differences between sketches in *Reed* and *Escobedo* and tattoo in *Whitmill*); *id.* at 1729 (citing Complaint at 2, *Whitmill v. Warner Bros. Entm’t Inc.*, No. 4:11-CV-00752 (E.D. Mo. Apr. 28, 2011)) (“The question of copyrightability in a case like *Whitmill* is complicated by the fact that there were no copyrightable preliminary drawings upon which the Tyson tattoo was subsequently based. Therefore, when Whitmill registered his work with the Copyright Office, his registration was for the tattoo fixed on Mike Tyson’s face, not a prior drawing or sketch fixed on a piece of paper.”).

205. See *id.* at 1732 (discussing what Congress’s intentions were concerning meaning of “copies” in Copyright Act); see also 17 U.S.C. § 101 (“‘Copies’ are material objects, other than phonorecords, in which a work is fixed by any method now known or later developed, and from which the work can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device”).

206. Minahan, *supra* note 20, at 1732 (quoting *Object*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/dictionary/object> [<https://perma.cc/BE44-V43Q>] (last visited Mar. 7, 2017)).

207. *Id.* at 1732. For further discussion about why Congress did not intend for the human body to be considered a copy, see *supra* notes 147–153, 171, 205–216 and accompanying text.

Reviewing the Copyright Act's language also supports the assertion that Congress did not intend for the human skin to be a medium upon which an expression can be fixed.²⁰⁸ Section 102 of the Copyright Act lists works of authorship, and Section 101 defines each form of authorship as well.²⁰⁹ The closest form of authorship a tattoo can fall under is an architectural work, but there is a major hurdle that prevents contemporaneously designed and placed tattoos from falling under this form of authorship.²¹⁰ First, the definition of architectural work is an option because just like buildings, tattoos are an expression that needs a physical presence, as both are not an actuality until they are formed into a tangible entity.²¹¹ What complicates this avenue from being successful is that contemporaneously designed and placed tattoos would not fall under this category, but tattoos based on preliminary drawings would because a design is required.²¹² Contemporaneously-placed tattoos are placed on skin freehand, without any preparatory sketches or designs, and because the Act states the "design of a building," and includes various forms of pre-planning, contemporaneously-placed tattoos would not be eligible for copyright protection.²¹³

208. Minahan, *supra* note 20, at 1732–33 (discussing why Congress did not intend for human body to be considered copyrightable under Copyright Act).

209. See 17 U.S.C. §§ 101–02 (listing and defining works of authorship).

210. See Parker, *supra* note 59, at 771–78 (discussing tattoos as architectural works). *But see* Hatic, *supra* note 111, at 401 (citing § 102(a)(5)) ("Tattoos most likely fall under the category of pictorial or sculptural works."). Section 102(a)(5) lists "architectural works" as a "work[] of authorship" afforded copyright protection under the Copyright Act. Parker explains that the Architectural Works Copyright Protection Act ("AWCPA"), "signed into law on December 1, 1990," amended the Copyright Act "to include architectural works, and added Section 120: Scope of Exclusive Rights in Architectural Works." Parker, *supra* note 59, at 771 n.65. Parker characterizes the AWCPA as "extend[ing] copyright protection to architecture and to finished architectural works in ways that had never been seen before in this country." *Id.* at 771.

211. Parker, *supra* note 59, at 774 ("The AWCPA separates protection of the architect's right in the design of the building from the building owner's rights in the physical building. So too does our AWCPA-derived standard start from the assumption that there are (and should be) different rights associated with the design and the physical tattoo.").

212. See Minahan, *supra* note 20, at 1735 (discussing distinction between preliminary sketches and contemporaneous tattoos). For further discussion about the difference between tattoos based on preliminary sketches and contemporaneous tattoos, see *supra* notes 20–24 and accompanying text.

213. § 101; see Parker, *supra* note 59, at 774 (stating that utility of "the AWCPA is that it allows us to separate the two different 'items' involved in copyright disputes over tattoos: the design and the actual tattoo"). Section 101 of the Copyright Act defines an "architectural work" as "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composi-

Finally, because of the complications that come with balancing the interest of the copyright owner and the interest of the tattoo bearer, human skin is not a proper medium on which a work can be fixed.²¹⁴ In addition, human beings would not be deemed material objects in which can be a copy, and later be reproduced.²¹⁵ Therefore, because skin does not meet the requirements to be considered for copyright protection, contemporaneously-placed and preliminary-sketched tattoos are not copyrightable, only a preliminary drawing.²¹⁶

C. Public Policy Outweighs Tattoo Artists' Intellectual Property Rights

Tattoo bearers' interests significantly outweigh the interests of the tattoo artists.²¹⁷ Extending protection to tattoos will cause a slippery slope and make it difficult for the courts to draw a line regarding how much control a tattoo artist can have over a tattoo's display and to what extent.²¹⁸ Although tattoo artists' interests would be protected, it would be at a great cost.²¹⁹ Not extending copyright protection to contemporaneously-placed and preliminary-sketched tattoos does not mean tattoo artists do not have a

tion of spaces and elements in the design, but does not include individual standard features."

214. See *id.* at 773 ("Congress acted to protect the design of a building while differentiating between that design and its physical representation Written large in their choices is this differentiation and there is no reason why it should not be applied to other areas that are thematically, if not literally, similar."); Minahan, *supra* note 20, at 1732 ("By defining 'copies' as 'material objects,' Congress likely did not intend to include human skin within the category of mediums in which copyrightable work could be embodied.");

215. See Minahan, *supra* note 20, at 1735 (acknowledging that illogical result of including human bodies as material objects supports conclusion that human bodies cannot be copies).

216. See *id.* ("In the case of tattoos created as they are applied to a person's skin, since the resultant tattoo would not be embodied in 'copy,' there would be no copyright protection available for the tattoo.");

217. See Cummings, *supra* note 13, at 308–09 (advocating this position); Hatic, *supra* note 111, at 420 ("In tattoo cases, because of the nature of the medium in which the copyrighted work is fixed, interests including the right to publicity and the constitutional right to control one's body must weigh more heavily in determining whether infringement occurred.");

218. For further discussion about the negative consequence if tattooists are permitted to enforce their exclusive rights against bearers of tattoos, see *supra* notes 180–184 and accompanying text.

219. See Commander, *supra* note 15, at 1978–79 ("Although most scholars and lawyers quickly agree that tattoos deserve copyright protection, they also recognize that the 'potential for an artist to control a person's public appearances and activities is all too harmful to the ideals of individual autonomy and freedom.'") (quoting Cummings, *supra* note 13, at 309).

method to protect their work.²²⁰ Tattoo artists can make preliminary drawings that are subject to copyright protection.²²¹

D. Defenses Against Preliminary Drawings

Tattoo artists can and should register their preliminary drawings of celebrity tattoos if they desire copyright protection.²²² It is also true that as the bearer of the tattoo, celebrities should be permitted to publicly display the work without being liable for copyright infringement, and, under limited circumstances, third parties ought to be able to use the tattoo without infringing.²²³ There are two defenses tattoo bearers and third parties can use if tattoo artists claim that the tattoo bearers committed copyright infringement for the public display of the tattoo: (1) fair use and (2) implied license.²²⁴ Both defenses strike a balance between a copyright owner's interest in protecting their copyrighted work, a tattoo bearer's interest in protecting their right of publicity and autonomy concerns, and third parties' interests to comment on and criticize a work to increase dialogue in society.²²⁵

If a preliminary sketch was created prior to the design being tattooed on a celebrity, the public display of the tattoo should be treated as fair use only if the tattoo is not the primary focal point of the celebrity's public appearance.²²⁶ There are four factors to con-

220. See Minahan, *supra* note 20, at 1728 ("In both *Reed* and *Escobedo*, the tattoo artists each based their tattoo upon drawings and sketches they created prior to applying the tattoos to their respective clients. Assuming for the purposes of this Note that these preliminary drawings satisfied § 102(a), Reed and Escobedo likely owned the copyrights in their drawings.").

221. See *id.* (noting that tattoo artist that registered their preliminary drawings probably had copyrights in their preliminary sketches).

222. See *id.* at 1728–29 (reiterating that tattoo artist can register their preliminary sketches to receive copyrights in the sketches).

223. See King 3, *supra* note 18, at 450–52 (discussing right of publicity). For further discussion of a celebrity's right of publicity, see *supra* notes 165–172 and accompanying text.

224. See, e.g., King 2, *supra* note 7, at 57–63 (discussing fair use and implied licenses); Commander, *supra* note 15, at 1965–69 (discussing fair use); *id.* at 1974–76 (discussing implied licenses); see also *supra* notes 139–139 (discussing fair use); *supra* notes 154–162 (discussing implied licenses).

225. See Cummings, *supra* note 13, at 316–17 ("Because the values of human dignity and individual autonomy are so firmly rooted in this nation's core, a court would be acting inappropriately if it did not eliminate any potential for a tattoo artist to control a recipient's public appearances to any degree. This is a freedom that cannot be forgone under the Thirteenth Amendment."); Hatic, *supra* note 111, at 409–10 (discussing purposes of fair use doctrine stated in Section 107 of the Copyright Act).

226. See Cummings, *supra* note 13, at 317 (arguing that if public appearance is "for the *specific purpose* of showcasing or discussing the tattoo," then fair use should not apply); Hatic, *supra* note 111, at 410 (citing 17 U.S.C. § 504(c)) ("A copyright

sider when determining whether a reproduction of a copy is fair use.²²⁷ These factors are as follows:

(1) the purpose and character of the use, including whether such use is of a commercial nature or is for non-profit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.²²⁸

Factors two and four can be used to persuade courts to determine that their public display of their tattoo is fair use.²²⁹ A celebrity can argue that once the preliminary sketch was tattooed on her and became so intertwined with her persona, the tattoo is no longer a form of expression created by the tattoo artist, but a fact associated with the celebrity.²³⁰ Since the tattoo is an unprotected fact, a celebrity can publicly display the tattoo when she desires because a fact does not receive protection under copyright law.²³¹ The other

owner must register his copyright before an infringement occurs to be eligible to receive statutory damages and attorney's fees under section 504(c)."). For further discussion about why public display of tattoo is fair use if the tattoo is not the primary focal point, see *infra* notes 231–236 and accompanying text.

227. See § 107 (listing factors); King 2, *supra* note 7, at 58 (listing factors); Cummings, *supra* note 13, at 292–93 (citing § 107) (discussing factors).

228. § 107.

229. See King 2, *supra* note 7, at 62–63 (discussing utility of factors in court); Cummings, *supra* note 13, at 317 (discussing factor two of fair use doctrine).

230. See King 1, *supra* note 36, at 158 ("Assuming that the human body is a useful article, tattoos are not physically separable from a person. The tattoo is not capable of existing independently of the human medium of expression. A tattoo is not akin to a lamp base, which can exist on its own. A tattoo is a sufficiently permanent part of the person's body."); *Fair Use*, BYU COPYRIGHT LICENSING OFFICE, <https://sites.lib.byu.edu/copyright/about-copyright/fair-use/> (last visited Mar. 7, 2017) (stating Factor Two, "the nature of the copyrighted work," "will generally weigh in favor of fair use if the work to be used is factual in nature (technical, scientific, etc.), as opposed to works involving more creative expression, such as plays, poems, fictional works, photographs, paintings, and so on"); see also HOWARD B. ABRAMS, *THE LAW OF COPYRIGHT* § 15:52 (2017) ("Two types of distinctions as to the nature of the copyrighted work have emerged that have figured in the decisions evaluating the second factor: (1) whether the work is expressive or creative, such as a work of fiction, or more factual, with a greater leeway being allowed to a claim of fair use where the work is factual or informational, and (2) whether the work is published or unpublished, with the scope for fair use involving unpublished works being considerably narrower.").

231. *Cf.* New Era Publ'ns Int'l v. Carol Pub. Grp., 904 F.2d 152, 157 (2d Cir. 1990) (discussing copyright dispute over quotations from copyrighted works used in biography). The Second Circuit explained that:

[T]he scope of fair use is greater with respect to factual than non-factual works. While there is no bright-line test for distinguishing between these two categories, we have referred to the former as works that are "essen-

factor that can be used is that there is little to no effect of the use on the market or value of the copyrighted work.²³² If the tattoo was specifically created for the celebrity, there was only a one-time use for the design and no harm is done to the value of the design because the tattoo artist had no intention to showcase or replicate the tattoo in the future.²³³ If the tattoo is a design that can be picked out of a portfolio and has been tattooed on patrons multiple times, the public display of the tattoo on the celebrity would increase value of the tattoo instead of decrease because it is associated with the celebrity.²³⁴ A celebrity can argue factors two and four to convince a court that a public display of a tattoo is fair use.²³⁵ The limitation attached to when a public display is fair use—if the tattoo is not the primary focal point of the celebrity’s public appearance—balances a tattoo artist’s interest in exercising control over the work without having control over the bearer of the tattoo.²³⁶ Fair use

tially factual in nature,” or “primarily informational rather than creative.” We have some hesitation in trying to characterize [L. Ron] Hubbard’s diverse body of writings as solely “factual” or “non-factual,” but on balance, we believe that the quoted works—which deal with Hubbard’s life, his views on religion, human relations, the Church, etc.—are more properly viewed as factual or informational.

Id. (citations omitted).

232. See *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 450 (1984) (“The purpose of copyright is to create incentives for creative effort. Even copying for noncommercial purposes may impair the copyright holder’s ability to obtain the rewards that Congress intended him to have. But a use that has no demonstrable effect upon the potential market for, or the value of, the copyrighted work need not be prohibited in order to protect the author’s incentive to create.”); see also *BYU COPYRIGHT LICENSING OFFICE*, *supra* note 230 (stating the fourth factor of fair use under Section 107 of Copyright Act “examines the anticipated effect of the use on the publisher’s market. If the proposed use is likely to become widespread and would negatively affect the market for or value of the copyrighted work, this factor would weigh against fair use”).

233. See *Burnett v. Twentieth Century Fox Film Corp.*, 491 F. Supp. 2d 962, 971 (C.D. Cal. 2007) (discussing effect of use on potential market factor). In *Burnett*, the court explained that the fourth fair use factor requires courts to “consider ‘the extent of market harm caused by the particular actions of the alleged infringer,’ as well as ‘whether unrestricted and widespread conduct of the sort engaged in by the defendant ... would result in a substantially adverse impact on the potential market’ for the original.” *Id.* (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 590 (1994)).

234. See *id.* (discussing effect of use on potential market factor).

235. But see *id.* (“Since fair use is an affirmative defense, its proponent would have difficulty carrying the burden of demonstrating fair use without favorable evidence about relevant markets.”) (footnotes omitted); King 2, *supra* note 7, at 62–63 (citing *Campbell*, 510 U.S. at 590) (“Factor four must also be determined in context, but it is difficult for a defendant to succeed on this factor without favorable evidence about relevant markets.”).

236. See *Cummings*, *supra* note 13, at 317 (“This qualification is included for fairness reasons—while it is undoubtedly good public policy to eliminate a tattoo artist’s control over a recipient, that recipient should not be able to exploit this

defense can be used by third parties under limited circumstances such as “criticism, comment, news reporting, teaching . . . scholarship, or research.”²³⁷ Third parties involved in a commercial industry would have to try to create their work so that it falls within one of the permissible uses if they do not want to be found as infringers.²³⁸

If a court is not persuaded by a fair use defense, a celebrity can always fall back on the argument that the tattoo artist gave an implied nonexclusive license to allow her to display the tattoo.²³⁹ Celebrities can argue that they were given an implied license when the tattoo artist tattooed the design on their bodies.²⁴⁰ It is reasonable to conclude that tattoo artists do grant the right of public display to their clients when the tattoo artist tattoos a design on their client’s body without further notification of limitations associated with the use of the tattoo.²⁴¹

It is important to note that an implied license can be revoked unless there is consideration.²⁴² Consideration is established when

power. Thus, if a recipient were to go on television for the *specific purpose* of showcasing or discussing the tattoo, the recipient would still need to obtain express authorization by the author to do this.”).

237. § 107; *see also* U.S. COPYRIGHT OFFICE, *supra* note 135 (“Fair use is a legal doctrine that promotes freedom of expression by permitting the unlicensed use of copyright-protected works in certain circumstances. Section 107 of the Copyright Act provides the statutory framework for determining whether something is a fair use and identifies certain types of uses—such as criticism, comment, news reporting, teaching, scholarship, and research—as examples of activities that may qualify as fair use.”).

238. *See* U.S. COPYRIGHT OFFICE, *supra* note 135 (stating that four factors to consider when assessing whether fair use applies and that weighing of factors depend on circumstances).

239. *See generally* King 2, *supra* note 7, at 63–67 (discussing implied license to use tattoos); Bloom, *supra* note 154, at 458–70 (discussing implied license to use tattoos); Commander, *supra* note 15, at 1974–76 (discussing implied license to use tattoos); Hatic, *supra* note 111, at 431–33 (discussing implied license to use tattoos).

240. *See, e.g.,* Commander, *supra* note 15, at 1975 (citing Hatic, *supra* note 111, at 431–32) (“An artist can grant or imply a nonexclusive license by spoken word or even mere conduct. An implied nonexclusive license does not transfer any ownership interest in the copyrighted work to the licensee but allows the licensee to use the work in ways specified by the licensor.”).

241. *See id.* (noting that tattoo artists in *Allen*, *Whitmill*, and *Escobedo* “conceded in their complaints that their athlete clients had an implied license to publicly display the work in order to pursue a livelihood in acting and sports”); Bloom, *supra* note 154, at 464 (“The tattoo artist recognizes that by his doing, the tattoo has become part of another person’s body and its use will no longer flow from his hand. Rather, the tattoo will now take its direction from the tattoo holder. Behind every tattoo artist’s actions, therefore, lies the intent to transfer specific rights that may be exercised during the normal course of his life.”).

242. *See* King, *supra* note 7, at 67 (noting implied licenses are revocable when not supported by consideration); Bloom, *supra* note 154, at 470 (“An implied li-

a customer pays to get the tattoo adorned on his or her body.²⁴³ Therefore, when a tattoo artist receives payment for the tattoo and places the tattoo on their client's body, the implied license that was granted is irrevocable.²⁴⁴ Furthermore, the irrevocable implied license does not extend to third parties.²⁴⁵ When an implied nonexclusive license is granted, the licensee does not have authority to grant their implied license to a third party.²⁴⁶ The third party must receive permission from the owner of the copyright.²⁴⁷ For example, THQ's use was not covered by the implied license Escobedo gave to Condit when he placed the tattoo on Condit's body.²⁴⁸

To sum up, the fair use defense and implied license defense are cogent arguments that a celebrity may use if a tattoo artist claims that she committed copyrighted infringement by publicly displaying a tattoo.²⁴⁹ Under both defenses, the interests of the tattoo artist and bearer of the tattoo are met by allowing the tattoo artist to require authorization to publicly display a tattoo under limited circumstances that do not impede on a celebrity's right to con-

cense is generally revocable by the copyright owner. Where the license has been revoked, further use of the copyrighted work will constitute infringement, absent another affirmative defense. An implied license that is supported by consideration, however, is irrevocable. Such a license is considered a contract.”).

243. See Bloom, *supra* note 154, at 470–71 (acknowledging potential argument that “additional consideration be given for the implied license, particularly where there is no showing that the license is part of the initial tattoo transaction,” but concluding that consideration paid for tattoo also serves as consideration for implied license to use tattoo).

244. See *id.* (“Nevertheless, when a tattoo artist grants an implied license to a tattoo holder covering use of the copyrighted work during the normal course of his being, such license is so closely bound with the transaction that it becomes irrevocable. A tattoo artist who accepts payment for his work also accepts that the work will be used throughout the tattoo holder's life. Thus, the consideration paid for the tattoo will also support use of the tattoo in such a manner. It is inconceivable that a tattoo holder would pay for a tattoo design that he could not display, add to or remove.”).

245. See King 2, *supra* note 7, at 63 (“However, while the scope of this license may encompass commercial use of the work, particularly for clients who are athletes and celebrities, the license does not cover commercial uses by third parties, or in instances like *Reed*, a client's cooperation with third parties' commercial use of a tattoo.”).

246. See DIGITAL MEDIA L. PROJECT, *supra* note 162 (noting that recipient of implied nonexclusive license cannot transfer their rights via transfer or license without copyright owner's authorization).

247. See *id.* (stating that third party must receive permission from copyright owners to be granted license).

248. For further discussion about *Escobedo*, see *supra* notes 117–123 and accompanying text.

249. For further discussion about the fair use and implied license defenses, see *supra* notes 222–248 and accompanying text.

trol his or her body.²⁵⁰ Third parties are unable to use an implied license as a defense because implied licenses do not include third-party usage of a copyrighted work.²⁵¹ However, the fair use defense is a viable option if a third party uses a copyrighted work as some of the listed ways in Section 107 of the Copyright Act.²⁵²

IV. CONCLUSION

Extending copyright protection to preliminary drawings and not to contemporaneously-placed and preliminarily-sketched tattoos balances the purpose of the Copyright Act, societal policy concerns, the copyright owner's interest, and the tattoo bearer's right to control his or her body and not be subject to enslavement.²⁵³ Contemporaneously-placed and preliminarily-sketched tattoos should not be afforded protection because human bodies do not constitute objects that can be fixed.²⁵⁴ One effect of not granting contemporaneously-placed and preliminarily-sketched tattoos copyright protection is that clients and third parties can use the tattoos without restriction.²⁵⁵ To strike a balance between tattooists' and tattoo bearers' interests, authors of preliminary drawings should be afforded the exclusive rights provided under the Copyright Act.²⁵⁶ Their exclusive rights can be curtailed by implied licenses and fair

250. See *supra* notes 236 and accompanying text (discussing why public display of tattoo is fair use if the tattoo is not primary focal point); see also Cummings, *supra* note 13, at 317 (noting limitation to fair use defense).

251. See DIGITAL MEDIA L. PROJECT, *supra* note 162 (noting that recipient of an implied nonexclusive license cannot transfer their rights via transfer or license without copyright owner's authorization).

252. 17 U.S.C. § 107 ("Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, including such use by reproduction in copies or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.").

253. U.S. CONST. ART. I, § 8, cl. 8 ("[t]o promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries"); see also Cummings, *supra* note 13, at 318 ("By balancing important social policy goals, the artist-recipient relationship, and the text of the law, a compromise that protects human rights while supporting tattoos as an artistic genre is indeed possible.").

254. § 102(a); see *supra* notes 204–216 and accompanying text.

255. See Minahan, *supra* note 20, at 1735 ("In the case of tattoos created as they are applied to a person's skin, since the resultant tattoo would not be embodied in a 'copy,' there would be no copyright protection available or the tattoo. Therefore, the tattoo artist would have no intellectual property rights in the tattoo that could restrict the client's or third party's use of the tattoo."); see also *supra* notes 204–216 and accompanying text.

256. See *supra* notes 191–252 and accompanying text.

use.²⁵⁷ While celebrities can exercise their ability to publicly display the tattoo, industries driven by celebrity athletes still have obstacles to overcome to use preliminary drawings.²⁵⁸

If athletes desire to see their tattoos in major advertisements, movies, or video games, it is best that they obtain a release from their tattoo artist.²⁵⁹ Without a release, third parties in the sports industry will have to obtain a license from the copyright owner.²⁶⁰ If it is too much work to obtain a license, athletes' tattoos may not be used at all.²⁶¹ In the end, when preliminary drawings are later tattooed on the human body and the ink dries, tattoo artists own the copyrights to the drawings, not the tattoo itself.²⁶²

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257. For further discussion about implied license and fair use defenses against preliminary sketches, see *supra* notes 222–252 and accompanying text.

258. See Commander, *supra* note 15, at 1976 (citing Darren Heitner, *Questions Concerning Copyright of Athlete Tattoos Has Companies Scrambling*, FORBES (Aug. 14, 2013, 8:01 AM), <http://www.forbes.com/sites/darrenheitner/2013/08/14/questions-concerning-copyright-of-athlete-tattoos-has-companies-scrambling/>) (“During the NFL Combine, a training camp for potential professional football players, the Association correctly proposed the most ideal solution. It ‘advised agents to tell their players that when they get tattoos going forward, they should get a release from the tattoo artist, and if they can track down their former artists, they should get a release’ from them as well.”).

259. See Darren Rovell, *New ‘Madden’: Deal Done in Ink*, ESPN (June 5, 2014), http://www.espn.com/nfl/story/_/id/11036778/madden-15-feature-san-francisco-49ers-qb-colin-kaepernick-tattoos [<https://perma.cc/8B7E-CBMC>] (noting how Collin Kaepernick had his tattoo artists sign waivers so that his tattoos could be featured in Madden ‘15); see also Samit Sarker, *Why Tattoos Are Just Now Returning to Madden with NFL Madden 15*, POLYGON (June 5, 2014, 3:00 PM), <http://www.polygon.com/2014/6/5/5782540/madden-nfl-15-tattoos-returning-colin-kaepernick> [<https://perma.cc/W8TW-NZ7W>] (“As it stands, EA will only use real tattoos if the athlete himself first goes out and secures the permission of the artists. That’s exactly what Kaepernick did, because he ‘takes his tattoos as a personal self-expression that he wants represented in any product or marketing thing that he’s a part of,’ said Graddy.”) (quoting *Madden NFL* line Producer, Seann Graddy).

260. See DIGITAL MEDIA L. PROJECT, *supra* note 162 (noting that third party has to go to copyright owner to obtain a license to use copyrighted work).

261. See Zane Simon, *Due to Past Lawsuit Trouble, EA’s UFC Game Will Not Feature Carlos Condit’s Tattoo*, SBNATION (June 17, 2014, 7:00 PM), <http://www.bloodyelbow.com/2014/6/17/5818700/ea-ufc-video-game-carlos-condit-tattoo-left-out-lawsuit-mma-news> [<https://perma.cc/HFZ5-7JJT>] (stating how due to past litigation with tattoo artist, Escobedo, Condit’s tattoo would not be featured in UFC game).

262. See *id.* (“Condit’s artist, Chris Escobedo, claims that ‘they’re doing it without consulting the original artists, and that’s what makes it illegal.’”) (quoting Escobedo).

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